DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-1018
Title: Steve A. Filarsky, Petitioner
v.
Nicholas B. Delia
Docketed: February 10, 2011
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (09-55514)
Decision Date: September 9, 2010
Rehearing Denied: November 8, 2010

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Feb 3 2011	Petition for a writ of certiorari filed. (Response due March 14, 2011)
Mar 10 2011	Brief amici curiae of League of California Cities, et al. filed.
Mar 30 2011	DISTRIBUTED for Conference of April 15, 2011.
Apr 11 2011	Response Requested . (Due May 11, 2011)
Apr 21 2011	Order extending time to file response to petition to and including June 10, 2011.
Jun 10 2011	Brief of respondent Nicholas B. Delia in opposition filed.
Jun 20 2011	Reply of petitioner Steve [illegible] Filarsky filed. (Distributed)
Jun 22 2011	DISTRIBUTED for Conference of September 26, 2011.
Sep 27 2011	Petition GRANTED.
Nov 14 2011	SET FOR ARGUMENT ON Tuesday, January 17, 2012.
Nov 14 2011	Joint appendix filed. (Statement of costs filed)
Nov 14 2011	Brief of petitioner Steve A. Filarsky filed.
Nov 18 2011	CIRCULATED.
Nov 18 2011	Brief amici curiae of League of California Cities, et al. filed. (Distributed)
Nov 21 2011	Brief amicus curiae of United States filed. (Distributed)
Nov 21 2011	Brief amicus curiae of American Bar Association filed. (Distributed)
Nov 21 2011	Brief amicus curiae of DRI-The Voice of The Defense Bar filed. (Distributed)
Nov 21 2011	Brief amici curiae of Kansas and Other States filed. (Distributed)
Nov 21 2011	Brief amici curiae of National School Boards Association, et al. filed. (Distributed)
Dec 9 2011	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Dec 14 2011	Brief of respondent Nicholas B. Delia filed. (Distributed)
Dec 20 2011	Brief amicus curiae of The American Association for Justice filed. (Distributed)
Jan 6 2012	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae

	and for divided argument GRANTED.
Jan 10 2012	Reply of petitioner Steve A. Filarsky filed. (Distributed)
Jan 17 2012	Argued. For petitioner: Patricia A. Millett, Washington, D. C.; Nicole A. Saharsky, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Michael A. McGill, Upland, Cal.
Apr 17 2012	Judgment REVERSED. Roberts, C. J., delivered the opinion for a unanimous Court. Ginsburg, J., and Sotomayor, J., filed concurring opinions.

PETITION
FOR
WRIT OF
CERTIORARI

Supreme Court, U.S.
FILED

No. 101018 FEB 3 - 2011

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In The
Supreme Court of the United States

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STEVE A. FILARSKY, ESQ.,

Petitioner,

v.

NICHOLAS B. DELIA,

Respondent.

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On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

◆

PETITION FOR A WRIT OF CERTIORARI

◆

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QUESTION PRESENTED FOR REVIEW

In *Richardson v. McKnight,* 521 U.S. 399, 408 (1997), a bare majority of this Court declined to extend qualified immunity to private prison guards, but expressly noted a historical basis of immunity for private lawyers working "at the behest of the sovereign." *Id.* at 407. The *Richardson* majority also expressly did not preclude qualified immunity for private parties working as "adjunct[s] to government." *Id.* at 413. Based on *Richardson,* the Sixth Circuit has accorded immunity to such "private" lawyers. *Cullinan v. Abramson*, 128 F.3d 301 (6th Cir. 1997). Contravening *Richardson* and expressly disagreeing with *Cullinan*, the Ninth Circuit in this case denied qualified immunity to a "private" lawyer retained by the government solely because of his "private" status, even though it accorded qualified immunity to all of the individual government actors involved, thereby completely exonerating them for the very same conduct, which did not violate any clearly established rights. App., *infra,* 4-5, 12-24. The question thus presented is:

Whether a lawyer retained to work with government employees in conducting an internal affairs investigation is precluded from asserting qualified immunity solely because of his status as a "private" lawyer rather than a government employee.

PARTIES TO THE PROCEEDING

Petitioner (defendant and appellee below):
STEVE A. FILARSKY, ESQ.

Respondent (plaintiff and appellant below):
NICHOLAS B. DELIA

Additional defendants and appellees below:
CITY OF RIALTO, a Public Entity; CITY OF RIALTO FIRE DEPARTMENT, a Public Agency; STEPHEN C. WELLS, Individually and as the Fire Chief of the City of Rialto; MIKE PEEL, Individually and as the Battalion Chief for the City of Rialto; FRANK BEKKER, Individually and as the Battalion Chief for the City of Rialto. These defendants were parties to the underlying Ninth Circuit decision; however, they no longer have an interest in the case as the Ninth Circuit upheld their grant of summary judgment based upon an extension of qualified immunity.

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Petitioner, Steve A. Filarsky, Esq. (hereinafter referred to as "Petitioner Filarsky") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

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OPINIONS BELOW

The Ninth Circuit's Order denying rehearing *en banc* and amended opinion are reported at 621 F.3d 1069 (9th Cir. 2010). App., *infra*, 1-38. The Opinion of the United States District Court for the Central District of California, including the Judgment and Statement of Uncontroverted Facts, is not reported and is included in the Appendix at pages 39-51.

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JURISDICTION

The Ninth Circuit issued its decision on September 9, 2010. Petitioner Filarsky timely filed a petition for rehearing *en banc*, which was denied on November 8, 2010. App., *infra*, 1-38. This Court has jurisdiction under 28 U.S.C. section 1254(1).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the placed to be searched, and the persons or things to be seized. U.S. Const. amend. IV.

Section One of the Fourteenth Amendment to the United States Constitution provides:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV.

Section 1983 of Title 42 of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of

> Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. 42 U.S.C. section 1983.

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STATEMENT OF THE CASE

1. Petitioner Filarsky is a private attorney who performed services at the behest of the City of Rialto, a public municipality organized under the laws of the State of California (hereinafter referred to as the "City"). App., *infra,* 6-7, 54, 59, 88-89. The City retained Petitioner Filarsky to provide labor and employment law guidance, including participation in internal affairs investigations involving City employees. App., *infra,* 6-7, 54, 59, 88-89. In participating in such internal investigations on behalf of the City, Petitioner Filarsky acted under color of state law and within the course and scope of his

employment with the City. App., *infra*, 6-7, 54, 58-59, 88-89.

On September 18, 2006, an interview of Respondent Nicholas B. Delia, a firefighter for the City (hereinafter referred to as "Respondent Delia"), was conducted in connection with an internal investigation; the subject matter of the investigation was the suspected inappropriate use of "sick time" by Respondent Delia to work on a home remodeling project. App., *infra*, 6-8, 60, 89-90. Battalion Chiefs Mike Peel and Frank Bekker, Respondent Delia's attorney Stuart Adams, and Petitioner Filarsky were present (hereinafter collectively referred to as "Battalion Chiefs"). App., *infra*, 7, 58, 90. On behalf of the City, Petitioner Filarsky was investigating Respondent Delia after the City obtained a *sub rosa* videotape which depicted him purchasing building materials (hereinafter "Subject Building Materials") and unloading them at his home on a "sick" day. App., *infra*, 6, 60, 89. Petitioner Filarsky was retained by the City as legal counsel because of his experience in personnel and internal affairs matters. App., *infra*, 6, 59, 88-89.

Petitioner Filarsky has conducted numerous investigations on behalf of the City over the past fourteen years, and was routinely expected to conduct not only the investigation and interviews, but to provide legal analysis, propose alternative disciplinary actions, draft correspondence regarding disciplinary actions directed by City employees, and to participate in legal proceedings and hearings. App., *infra*, 6-7, 58-59, 88-90.

During the interview on September 18, 2006, Respondent Delia offered in his defense that he had not incorporated the Subject Building Materials into his home remodeling project and that the Subject Building Materials remained unused at his residence. App., *infra*, 7, 60, 90.

After a short meeting, the City authorized Petitioner Filarsky to inform Respondent Delia that if he would simply show the Battalion Chiefs the Subject Building Materials to validate his explanation, the investigation would be over and it would be resolved in Respondent Delia's favor with no disciplinary action whatsoever. App., *infra*, 7-8, 60-61, 90-91. Thereafter, Petitioner Filarsky so advised Respondent Delia. App., *infra*, 7-8, 60-61, 90-91.

During the interview, Respondent Delia was represented by attorney Stuart Adams; when Respondent Delia was asked to show the Subject Building Materials to his superiors, Adams advised Respondent Delia to refuse to produce the Subject Building Materials. App., *infra*, 8, 61-62, 91. Based on advice of counsel, Respondent Delia then declined to comply. App., *infra*, 8, 61-62, 91. The request was then clarified in the interview by Petitioner Filarsky, who indicated that the City had no desire or intention of going inside Respondent Delia's home at all but rather wanted him to simply bring out a sample of the unused Subject Building Materials to the front yard for visual verification to validate his story. App., *infra,* 8, 61-62, 91. Again, attorney Adams advised Respondent Delia to refuse to comply, even though it was expressly represented that the production of the Subject Building Materials would completely and immediately exonerate Respondent Delia. App., *infra,* 61-63, 91-92. Accordingly, Respondent Delia refused to comply. App., *infra,* 8, 61-63, 91-92.

Ultimately, Fire Chief Stephen C. Wells converted the request to produce the Subject Building Materials into a written order (hereinafter referred to as the "Order") and signed it, as Petitioner Filarsky had no authority to make such an order, unilaterally or otherwise. Petitioner Filarsky conveyed the Order to Respondent Delia and to Respondent Delia's counsel. App., *infra,* 8, 61-63, 91-92. At no point in time before or after the Order was issued was Respondent Delia ever threatened with insubordination and/or termination. App., *infra,* 63, 92-93.

Prior to conveying the Order to Respondent Delia, Petitioner Filarsky spoke directly to then-City of Rialto City Attorney Bob Owen on the telephone regarding the proposed Order. App., *infra,* 64, 93. Petitioner Filarsky advised Mr. Owen of the circumstances surrounding the investigation and the scope of the proposed Order. Additionally, Respondent Delia's counsel Mr. Adams also spoke to Mr. Owen prior to the Order being issued. App., *infra,* 64, 93. The City Attorney offered no objection to the proposed Order and could see no reason why the Order should not issue. App., *infra,* 64, 93.

Thereafter, no less than *four* (4) union representatives were called and summoned by Delia's counsel to the ongoing interview of Delia so that they could sit in and listen while Respondent Delia was directed to drive to his home, remove a sample of the unused Subject Building Materials from inside, and show them to the Battalion Chiefs. App., *infra,* 64, 93. The four union representatives listened to the Order and offered no objection whatsoever. App., *infra,* 64, 93.

Petitioner Filarsky did not attend the visit to Respondent Delia's home. App., *infra,* 64, 93-94. The only people who attended the visit to Respondent Delia's home were Respondent Delia, Respondent Delia's counsel, and Battalion Chiefs Peel and Bekker (Peel and Bekker remained in their car parked curbside the entire time and departed after a sample of the unused Subject Building Materials was brought outside by Respondent Delia). App., *infra*, 8, 9, 63, 93-94.

2. Respondent Delia filed a Complaint against Defendants City of Rialto Fire Department, Fire Chief Stephen C. Wells, Battalion Chief Mike Peel, Battalion Chief Frank Bekker, and Petitioner Filarsky, on May 21, 2008, in the United States District Court, Central District, based on the alleged violation of Respondent Delia's civil rights under the Fourth and Fourteenth Amendments of the U.S.

Constitution under 42 U.S.C. section 1983.[1] *See* App., *infra*, 3, 57. On January 12, 2009, Petitioner Filarsky moved for summary judgment, or in the alternative, summary adjudication of issues. Petitioner Filarsky asserted that: (1) he was entitled to the protection of the doctrine of qualified immunity as a private defendant who performed services at the behest of the sovereign, i.e., City of Rialto, (2) his conduct did not constitute a violation of Respondent Delia's constitutional rights for which a claim under 42 U.S.C. section 1983 could be sustained, (3) he had no obligation to countermand the City's decision to Order Respondent Delia to produce the Subject Building Materials, and (4) *even if* his conduct was ultimately determined to constitute a violation, it was not the violation of a "clearly established" constitutional right, thereby entitling him to the protection of the doctrine of qualified immunity.[2] App., *infra*, 53-55.

On February 2, 2009, the United States District Court, Central District, heard Petitioner Filarsky's motion for summary judgment (along with the other Defendants' motions for summary judgment); on that same day, the court granted Defendants' motions for summary judgment based upon the extension of qualified immunity which operated as a bar to suit. In addition, the District Court also found that Respondent Delia's Subject Building Materials display did not constitute a warrantless search and therefore was not a violation of Respondent Delia's constitutional rights. Specifically, the District Court held that:

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[1] Respondent Delia made other claims including a separate *Monell* claim against the City of Rialto, however, for brevity's sake, we do not discuss those claims within this petition.

[2] Also on January 12, 2009, Defendants City of Rialto, Bekker, Peel, and Wells filed their motion for summary judgment, or in the alternative summary adjudication, however, again for the sake of brevity the basis for their assertions will not be discussed in this Petition.

- Petitioner Filarsky was "protected from liability by the doctrine of qualified immunity as [his] conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known because Delia [had] not demonstrat[ed] a violation of a clearly established constitutional right in that Delia was not threatened with insubordination or termination if he did not comply with any order given and none of these defendants entered [Delia's] house." App., *infra*, 48.
- "Delia's claim against the City based on 42 U.S.C. section 1983 fails as a matter of law because neither Wells, Peel, Bekker nor Filarsky had final policymaking authority, none was the policymaker for the City for the purposes of the act about which Delia complain[ed] and Delia [had] provided no evidence of any longstanding practice or custom of the City or that any official with final policymaking authority ratified the conduct of which Delia complain[ed]." App., *infra*, 49.

3. On April 3, 2009, Respondent Delia filed a timely Notice of Appeal, appealing the District Court's decision in granting Defendants' motions for summary judgment. App., *infra*, 3-5. The Ninth Circuit reversed as to Petitioner Filarsky *only*. App., *infra,* 4-5. The opinion was authored by District Judge for the Northern District of Iowa, sitting by designation, Judge Mark W. Bennett; the opinion was joined by Judges Alfred T. Goodwin and Johnnie B. Rawlinson. App., *infra,* 2-3. The panel found that there was a violation of Respondent Delia's rights, but also unequivocally found that it was not a violation of a "clearly established right." App., *infra*, 4-5, 24. The panel therefore upheld the grant of summary judgment for the City employees based upon an extension of qualified immunity but *reversed* the District Court's decision as to Petitioner Filarsky by refusing to extend qualified immunity to him for the very same acts. App., *infra*, 4-5, 24-27.

In declining to extend the protection of qualified immunity to Petitioner Filarsky in this case, the Ninth Circuit panel relied solely on *Gonzalez v. Spencer,* 336 F.3d 832 (9th Cir. 2003). In *Gonzalez,* the Ninth Circuit rejected the attorney's claim of qualified immunity without ever considering the *Richardson* factors or taking into account the long tradition of extending the protection of qualified immunity to lawyers under such circumstances. *Id.* at 835 (quoting *Richardson*, 521 U.S. at 412).

Curiously, the Ninth Circuit panel opinion expressly acknowledged a conflict with the Sixth Circuit in the matter of *Cullinan v. Abramson*, 128 F.3d 301 (6th Cir. 2005). App., *infra*, 25. However, the Ninth Circuit still declined to consider *Cullinan*, contending erroneously that they were inextricably bound by the decision in *Gonzalez*.

4. Petitioner Filarsky petitioned for panel rehearing *en banc* on the grounds that: (1) rehearing was warranted given the fact that the Ninth Circuit's panel opinion directly conflicted with an existing opinion of another circuit court (Sixth Circuit) and substantially affected the nationwide application/ extension of the doctrine of qualified immunity to "private" lawyers working at the behest of the sovereign, by serving as an adjunct to government in an essential governmental activity, and acting under close official supervision, and (2) rehearing was necessary to secure and maintain the uniformity of the district court's decisions thereby creating an overriding need for national uniformity. App., *infra,* 3.

The League of California Cities filed an *amicus curiae* brief in support of Petitioner Filarsky's petition for rehearing *en banc*. Rehearing was denied. App., *infra*, 3.

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REASONS TO GRANT THE PETITION

The Ninth Circuit panel opinion skirts the thrust of the *only* Supreme Court opinion that addresses this issue directly: *Richardson v. McKnight*, 521 U.S. 399 (1997). While *Richardson* had a narrow holding, the standards it adopted – closely examining the history of and policy rationales for qualified immunity – remain uncontroverted and are clearly applicable to this matter. As such, the Ninth Circuit's opinion and its basis are in conflict with the rationale in *Richardson*. Further, the Ninth Circuit's opinion is also in direct conflict with decisions from other Circuit courts. In fact, the Ninth Circuit panel expressly acknowledged a conflict with the Sixth Circuit in the matter of *Cullinan v. Abramson*, 128 F.3d 301 (6th Cir. 1997). App., *infra*, 25. However, the Ninth Circuit declined to consider *Cullinan* at all, solely because they felt "bound" by their *Gonzalez* decision, notwithstanding that the doctrine of qualified immunity was not even at issue and was not briefed in *Gonzalez*.

In addition to *Cullinan v. Abramson*, the Ninth Circuit panel opinion conflicts with numerous decisions from other federal courts. *See, e.g., Cottingham v. Policy Studios Inc.,* 2008 U.S. Dist. LEXIS 23145-7 (U.S. Dist. Ct. for the Middle Dist. of Tennessee, Nashville Dist. 2008) (the court granted absolute prosecutorial immunity to a private attorney collecting alimony for the state because she acted at the "behest of the sovereign." The Court considered the history and policy arguments, creating a presumption of immunity for government contract lawyers); *Bartell v. Lohiser,* 215 F.3d 550, 556 (6th Cir. 2000) (in which private social workers were granted qualified immunity who provided a public service task under close government supervision and holding the purpose of the Supreme Court's articulation of qualified immunity standards is to allow public officials to perform important government functions free from debilitating effects of excessive litigation); *Eagon ex rel. Eagon v. City of Elk City,* 72 F.3d 1480, 1489 (10th Cir. 1996) (holding a private individual who performs a government function pursuant to a state order or request is entitled to qualified immunity if a state official would have been entitled to such immunity); *Lee v. Wyatt,* 2009 U.S. Dist. LEXIS 47357 (U.S. Dist. Ct. for the Western Dist. of Oklahoma 2009) (relying on *Richardson's* recognition of common law immunity, a district court granted a private prison physician qualified immunity with a discussion of history and policy).

Clearly, the Ninth Circuit's opinion is in direct conflict with this Court's majority decision in *Richardson v. McKnight*, but it is also in direct conflict with the Sixth Circuit and other federal courts. In this petition, we therefore urge that certiorari should be granted to: (1) finally clarify the qualified immunity standard by addressing and applying the *Richardson* factors, explaining how they relate, how they are to be applied, and which are dispositive in order to reform the standard into a clear and coherent test; and (2) settle once and for all the split among the Circuits on the applicability of qualified immunity to "private" lawyers who are retained specifically to work with government employees in conducting essential governmental activities, and "acting under close official supervision."

Contradictory immunity standards impose heavy costs upon municipalities and, therefore, upon the public at large. The Ninth Circuit's opinion creates an inconsistent standard across the nation's jurisdictions. As such, lawyers must adapt to each jurisdiction's rules, requiring differences in benefits and personnel practices, depending on the jurisdiction. In essence, this Ninth Circuit opinion overtly dictates to municipalities how they can and cannot go about their legal business by creating a powerful economic deterrent to seeking the assistance and advice of outside counsel. Under the law thus created by the Ninth Circuit, a W-2 paid City attorney and Petitioner Filarsky could engage in precisely the same conduct, and yet the City attorney would be qualifiedly immune from suit itself, while Petitioner Filarsky would not, simply and solely because of his "private" status. This not only makes no logical sense, but is contrary to the rationale in this Court's majority decision in *Richardson*, as well as the rationale in its dissenting opinion. Certiorari should therefore be granted.

I. THE NINTH CIRCUIT OPINION CONTRAVENES THIS COURT'S DECISION ON QUALIFIED IMMUNITY, UNDER THE *RICHARDSON* FACTORS, AS TO GOVERNMENT-RETAINED "PRIVATE" LAWYERS WHO ARE "ACTING AT THE BEHEST OF THE SOVEREIGN" BY SERVING AS AN "ADJUNCT TO GOVERNMENT IN AN ESSENTIAL GOVERNMENTAL ACTIVITY" AND "ACTING UNDER CLOSE OFFICIAL SUPERVISION."

Until the Ninth Circuit's panel opinion in this case, no Circuit Court had ever categorically declined to extend the protection of qualified immunity to government-retained private lawyers while weighing the *Richardson* factors and examining the tradition of immunity. In fact, this Court carefully and specifically left open the opportunity of extending qualified immunity to private individuals, including by example lawyers, working "at the behest of a sovereign" when "special circumstances" were present. In *Richardson*, 521 U.S. at 407, citing *Tower v. Glover*, 467 U.S. 914, 921 (1984), and J. Bishop, Commentaries on Non-Contract Law §§ 704, 710 (1889) this Court stated that the common law 'did provide a kind of immunity for certain private defendants, such as doctors or lawyers who performed services at the behest of the sovereign.'" While the extent or "kind" of immunity was not discussed in *Richardson*, the United States Court of Appeals in the Sixth Circuit was confronted with the same legal question as to whether the "outside counsel" status of private lawyers and their firms made those defendants eligible for qualified immunity. *See Cullinan v. Abramson*, 128 F.3d 301, 310 (6th Cir. 1997). Ultimately, the Sixth Circuit determined that the rationales for qualified immunity applied to these lawyers and their firm in the same way they applied to the city's sometime law director, who was also a named defendant. *Id.* As such, the Ninth Circuit's opinion directly conflicts with this Court's holding in *Richardson* and creates a split in the Circuits by categorically denying the extension of qualified immunity to "private" lawyers working with government employees in "an essential government activity," and "acting under close official supervision."

A. Under The *Richardson* Majority Opinion, Petitioner Filarsky Is Entitled To Qualified Immunity In Light Of This Court's Reference To Historical Immunity For Lawyers Working "At The Behest Of The Sovereign."

In *Richardson v. McKnight*, this Court reviewed qualified immunity to the limited facts of its case where private actors were serving a largely public function – an inmate had sued a guard at a privately managed correctional center under 42 U.S.C. section 1983 for placing restraints tightly enough to cause physical injuries. *Richardson*, 521 U.S. at 401-402. The private guards asserted a qualified immunity defense from 42 U.S.C. section 1983 lawsuits. *Id.* After the District Court and the Sixth Circuit denied the guards' assertion of qualified immunity, this Court granted certiorari.

In this Court's 5-4 decision, the majority opinion in *Richardson* examined the history and policy rationales of immunity and determined that under the narrow facts and circumstances of that case involving a private company managing a prison, the private prison guards were not entitled to assert qualified immunity from 42 U.S.C. section 1983 lawsuits. *Richardson,* 521 U.S. at 401. In reaching this conclusion, the *Richardson* majority analyzed this Court's decision in *Wyatt v. Cole,* 504 U.S. 158 (1992), which held that a private individual accused of conspiring with government employees was not entitled to assert qualified immunity on the "narrow" circumstance where the private individual was "invoking state replevin, garnishment, or attachment statute." *Wyatt,* 504 U.S. at 168-169; *Richardson,* 521 U.S. at 404. The *Richardson* majority concluded that there were two (2) factors which *must* be analyzed in order to determine whether qualified immunity applied to the private prison guards in the 42 U.S.C. section 1983 action: (1) any history providing immunity to prison guards, and (2) the policy concerns or purposes underlying immunity which would warrant applying it to the prison guards in the 42 U.S.C. section 1983 action before it.

The *Richardson* majority found no "firmly rooted" tradition of immunity for private prison guards; on the contrary, previous cases held private prison guards liable for mistreating inmates. *Richardson,* 521 U.S. at 404. The majority determined that private contractors were heavily involved in prison management activities as far back as the 19th century and there was no conclusive evidence of a historical tradition of immunity for private parties carrying out these functions. *Richardson,* 521 U.S. at 405-407. History, therefore, did not provide any significant support for the immunity claim of the private prison guards. *Richardson,* 521 U.S. at 407. Specifically to highlight the direct contrast, the opinion noted that doctors and lawyers acting "at the behest of the sovereign" historically had immunity; thus, even though not applicable to facts in that case, this Court took great care to illustrate the circumstances in which qualified immunity *would* be extended, in particular to lawyers and doctors. *Richardson,* 521 U.S. at 407 (majority opinion) (citing *Tower v. Glover,* 467 U.S. 914, 921 (1984)).

The majority in *Richardson* determined that it was a closer question as to whether the purposes underlying qualified immunity warranted its application to private prison guards. *Richardson,* 521 U.S. at 407-408. This Court recognized that one of the primary purposes of the immunity doctrine is to protect public officials, as well as society, from unwarranted timidity by public officials who may be deterred from exercising their authority by the threat of lawsuits exposing them to personal liability for inadvertent violations. *Richardson,* 521 U.S. at 407-408. The *Richardson* majority opinion rejected the prison guard's argument that since they performed the same work as state prison guards, qualified immunity must be applied to a similar degree. The *Richardson* majority held that the mere performance of a government function should not make the difference between unlimited 42 U.S.C. section 1983 liability and qualified immunity especially for a private person who performs a job *without* government supervision or direction. *Richardson,* 521 U.S. at 409. (Italics added). The *Richardson* majority also noted that marketplace pressures were different for a private company versus a government employer and thus there was less concern with unwarranted timidity. *Richardson,* 521 U.S. at 409-410. The *Richardson* majority further indicated that private employees may be not be deterred by the threat of damages due in part to the availability of comprehensive insurance requirements for private companies as well as the ability to offer higher pay or extra benefits unavailable to civil service employees. *Richardson,* 521 U.S. at 412-413. Finally, the *Richardson* majority noted that the risk of distraction from lawsuits alone was not a sufficient ground for immunity. *Richardson,* 521 U.S. at 412.

The *Richardson* majority therefore concluded that private prison guards, unlike those who work directly for the government, do not enjoy immunity from suit in a 42 U.S.C. section 1983 case. *Richardson,* 521 U.S. at 412. Accordingly, while this Court concluded that none of the factors evident in that limited situation warranted the extension of qualified immunity to private prison guards *under those* *specific facts*, it clearly indicated that there was an established history of the extension of such immunity to lawyers acting in the same capacity as Petitioner Filarsky. *Id*. at 412. Finally, we think that it is not a coincidence that this Court in *Richardson* employed the example of *lawyers* having a lengthy history of immunity in illustrating how and under what circumstances qualified immunity should properly be extended.

B. The *Richardson* Majority Expressly Did Not Preclude Qualified Immunity For An Individual Working With The Government In An Essential Government Activity, And Under Close Supervision, Such As Petitioner Filarsky.

The Ninth Circuit's blanket prohibition against *any* private actor asserting qualified immunity in its jurisdiction simply because they are a "private" actor contravenes this Court's majority opinion in *Richardson* wherein it was specifically indicated that qualified immunity may be appropriately asserted by private individuals. *Richardson,* 521 U.S. at 413. App., *infra*, 26-27. As such, the Ninth Circuit completely ignored this Court's majority decision in their opinion by creating this blanket prohibition without ever considering the *Richardson* factors. Accordingly, Petitioner Filarsky's case involves facts that place it squarely under the parameters of this Court's majority opinion in *Richardson*, which left open the application of qualified immunity to be extended to private individuals, such as lawyers. It is therefore imperative that this Court now clarify the application and scope of the doctrine of qualified immunity to government-retained "private" lawyers working at the "behest of the sovereign" by working with government employees in "essential government activities" and "under close official supervision."

The majority opinion in *Richardson,* while holding that qualified immunity did not apply to the private prison guards under the particular circumstances of that case, expressly limited its holding as follows:

> [W]e have answered the immunity question narrowly, in the context in which it arose. That context is one in which a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertakes that task for profit and potentially in competition with other firms. The case does not involve a private individual briefly associated with a governmental body, serving as an adjunct to government in an essential government activity, or acting under close supervision. *Richardson,* 521 U.S. at 413.

By carefully carving out these exceptions, the majority in *Richardson* specifically allowed for the doctrine of qualified immunity to be extended to private individuals so long as the *purposes* of immunity were being properly served. *Richardson,* 521 U.S. at

413. As such, "a private individual . . . " "associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close supervision" should be entitled to assert qualified immunity. *Richardson,* 521 U.S. at 431.

The Ninth Circuit did not address this caveat; yet, the record in this case unequivocally establishes Petitioner Filarsky's continued involvement in the City's internal investigations under close supervision, which is a perfect fit under the criteria set forth in *Richardson.* Petitioner Filarsky has provided legal advice to the City on a multitude of labor and employment law matters over the past fourteen years, including internal affairs investigations. App., *infra,* 6-7, 59, 88-89. Moreover, Petitioner Filarsky performed such legal services for a variety of other municipalities and entities in the public sector. App., *infra,* 6-7, 59, 88-89. Further, it was and is undisputed that there was "state action" on the part of Petitioner Filarsky in that he was acting at the behest of the City at the time the alleged constitutional violation occurred. App., *infra,* 6-7, 54, 58-59, 88-89. Therefore, Petitioner Filarsky was unequivocally acting under 'color of state law' and within the course and scope of his employment with the City as a "private" attorney when he conducted the interview of Respondent Delia. As such, Petitioner Filarsky falls directly within the *Richardson* caveat of being a "private individual" "associated with a government body."

In addition, the record in this case clearly establishes Petitioner Filarsky was "serving as an adjunct to government in an essential governmental activity." *Richardson*, 521 U.S. at 413. Petitioner Filarsky served as a lawyer who specialized in labor and employment law, including personnel and internal affairs matters for the City of Rialto and, at its behest, conducted the interview of Respondent Delia in conjunction with the City's investigation of Respondent Delia's suspected inappropriate use of "sick time." App., *infra,* 6-7, 59, 88-89. The oral examination of City employees and rendering of legal advice in connection with employment and personnel issues is undoubtedly an essential governmental activity.

Further, the record in this case indicates that Petitioner Filarsky's participation in Respondent Delia's interview with *two* Battalion Chiefs in the room and the Fire Chief nearby more than satisfied the "acting under close official supervision" criteria in the *Richardson* caveat. App., *infra,* 6-7. Petitioner Filarsky's advice to the City was *completely consistent* with the Ninth Circuit's finding that this was not the violation of a "clearly established right." App., *infra,* 4-5, 20-24.

The District Court determined and the Ninth Circuit agreed Petitioner Filarsky's conduct was limited to directing the internal investigation and concurring with the Order. App., *infra,* 7-8. Petitioner Filarsky had neither the authority nor obligation to countermand the City's decision to order Respondent Delia to produce the Subject Building Materials. App., *infra*, 8, 62-63, 92. Moreover, Petitioner Filarsky did not have control over the Battalion Chiefs to make unilateral decisions regarding the outcome of this internal investigation. App., *infra*, 8, 62-63, 92. As such, Petitioner Filarsky's conduct clearly meets the "under close official supervision" factor of *Richardson*.

The Ninth Circuit wholly failed to address the *Richardson* Court's caveat by which this Court indicated qualified immunity may appropriately be asserted by a private individual. In fact, the Ninth Circuit completely ignored the majority decision in *Richardson* other than to quote the fact that the Sixth Circuit's decision in *Cullinan v. Abramson,* 128 F.3d 301 (1997) "relied exclusively on dictum in *Richardson v. McKnight*, 521 U.S. 399, 407, that 'the common law *did* provide a kind of immunity for certain private defendants, such as doctors or lawyers who performed services at the behest of the sovereign.'" App., *infra*, 25. The Ninth Circuit's opinion offers no further analysis of *Richardson* or its express limitations and guidelines.

Subsequently, the Ninth Circuit then completely contradicted itself by concluding that "they are not free to follow the *Cullinan* decision because they are "bound by prior panel opinions 'unless an en banc decision, *Supreme Court* decision or subsequent legislation undermines those decisions.'" App., *infra*, 25. (Italics added). The contradiction is ironic inasmuch as *Richardson* is a Supreme Court decision, which *Cullinan* directly cites and relies on, and which *should* in fact require the Ninth Circuit to follow.

Instead, the Ninth Circuit elected to claim that their hands were tied and they had no choice but to follow *Gonzalez v. Spencer,* 336 F.3d 832 (9th Cir. 2003), where the Ninth Circuit stated in *two sentences*, "[the attorney] is not entitled to qualified immunity. . . ." *Id.* at 835 (quoting *Richardson*, 521 U.S. at 412). It is abundantly clear that the Ninth Circuit never examined the *Richardson* factors, nor did it take into account the long tradition of extending immunity under these circumstances because the panel erroneously opined that it had no choice but to follow *Gonzalez*. The gravamen of this choice was that the Ninth Circuit held Petitioner Filarsky, the messenger conveying the Order, responsible for violating Respondent Delia's rights, while declining to extend to him the protection of qualified immunity but affording immunity to those who *actually had the power to issue the Order*.

Qualified immunity should therefore be extended to Petitioner Filarsky, and this Court should clarify that a "private" lawyer working at the "behest of the sovereign" by serving as an adjunct to government in an essential government activity and under "close official supervision" is entitled to an extension of qualified immunity under the *Richardson* majority opinion.

C. Even Under The *Richardson* Dissent's Functional Approach, Petitioner Filarsky Is Entitled To Qualified Immunity.

Four Justices dissented from the majority opinion in *Richardson*. The dissent authored by Justice Scalia and joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Thomas, argued that a functional approach should be applied to determine whether qualified immunity should be extended to private individuals. *Richardson,* 521 U.S. at 414-416. The dissent contended that the historical underpinnings and underlying immunity established that private parties who were performing governmental functions which give rise to qualified immunity should also be entitled to assert qualified immunity. *Richardson,* 521 U.S. at 414-416.

The dissent questioned the holding that qualified immunity should be "unavailable to employees of private prison management firms, who perform the same duties as state employed correctional officials, who exercise the most palpable form of state power, and who may be sued for acting 'under color of state law.'" *Richardson,* 521 U.S. at 414. Instead, the dissent relied upon prior Supreme Court precedent which held that immunity analysis rests on functional categories, not on the status of the defendant. *Richardson,* 521 U.S. at 416-417. The dissent recognized that private individuals have regularly been accorded immunity when they perform a governmental function that qualifies. *Richardson,* 521 U.S. at 417-418.

It was suggested in the dissent that the history of the functional approach should govern whether qualified immunity is extended to a private individual and that it should be not be dependent upon policy reasons. *Richardson,* 521 U.S. at 418. Nonetheless, the dissent analyzed the majority's policy reasons and concluded that the market pressures and insurance analysis employed by the majority was correct. *Richardson,* 521 U.S. at 419-420:

> [S]ince there is no apparent reason, neither in history nor in policy, for making immunity hinge upon the court's distinction between public and private guards, the precise nature of that discretion must also remain obscure. . . .
>
> Today's decision says that two sets of prison guards who are indistinguishable in the ultimate source of their authority over prisoners, indistinguishable in the powers that they possess over prisoners, and indistinguishable in the duties that they owed toward prisoners, are to be treated quite differently in the matter of their financial liability. . . . Neither our precedent, nor the historical foundations of section 1983, not the policies underlying section 1983, support this result. *Richardson,* 521 U.S. at 422-423.

It is clear from the record before this Court that Petitioner Filarsky finds himself in the exact situation that the dissent in the *Richardson* court alluded to: a private attorney, retained by the City to conduct internal affairs investigations (an essential government activity) acting as the City's attorney in matters relating to labor and employment. There is no distinction between the role and function of Petitioner Filarsky in serving the City's legal needs and that of its own in-house counsel/City Attorney. Ironically, the Ninth Circuit found that, for the same acts, those who had the power to issue the Order (City) were qualifiedly immune but Petitioner Filarsky was not. What Petitioner Filarsky was entitled to, according to the Ninth Circuit, was to become open to personal financial liability, while City employees engaging in the exact same conduct were qualifiedly immune and completely exonerated for their actions because suit is barred. App., *infra*, 4-5, 12-24.

A more far-reaching impact of the Ninth Circuit's opinion, and one which this Court touched on in the *Richardson* dissent is the question of the extent to which courts will refuse to extend qualified immunity to private actors under *any* circumstance, but especially where "private" lawyers are retained by municipalities to perform specialized legal services under circumstances where a state employee engaging in the identical conduct would clearly be entitled to immunity. In view of the Ninth Circuit's opinion, no sensible "private" attorney offering services to municipalities would continue to do so without an agreement by the municipality to indemnify them and hold them harmless. Hundreds of such lawyers statewide, and possibly thousands nationwide, perform private legal services in the public sector on a regular basis; *all* of them are now directly and adversely impacted by this Ninth Circuit opinion. This Ninth Circuit opinion will cause municipalities to be unable to afford to seek specialized legal guidance (such as employment law advice) without exposing themselves potentially to further financial expense by having to indemnify the attorneys they have retained, while *their regular employees* are otherwise immune.

In other words, the cities and their employees might be qualifiedly immune for the same conduct, but they may be obligated to later provide indemnity to private actors in the public sector or be deprived of the opportunity to obtain such services. As a practical matter, this opinion *takes away* the protection of qualified immunity from any "private" attorney working for a municipality throughout the Ninth Circuit. This policy rationale has been previously noted, with concern, by this very Court in examining immunity's purposes where performing a governmental function confers immunity. *See Richardson,* 521 U.S. at 417-418. It would be unfortunate to allow the Ninth Circuit's categorical denial, without explanation, of the application of qualified immunity to so-called "private" attorneys, to stand as precedent without a studied review of its potential effect on municipalities all over the country.

Finally, it should be noted that the extension of qualified immunity to private actors in the public sector does not constitute a "get out of trouble free card"; qualified immunity applies *only* where the infringement is inadvertent, accidental and not of a "clearly established right" and is therefore not a license to violate constitutional rights, regardless of whether the actor is public or private.

II. THE NINTH CIRCUIT OPINION CREATES A CIRCUIT SPLIT ON THE DOCTRINE OF QUALIFIED IMMUNITY BY CATEGORICALLY DENYING QUALIFIED IMMUNITY TO ALL GOVERNMENT-RETAINED "PRIVATE" LAWYERS.

Since *Richardson* was decided by this Court, the lower courts have varied widely in applying its factors; however, no Circuit Court had ever categorically denied the extension of qualified immunity to government-retained "private" lawyers when weighing the *Richardson* factors and examining the tradition of immunity until this Ninth Circuit opinion.

The Sixth Circuit in *Cullinan v. Abramson*, 128 F.3d 301, 310 (6th Cir. 1997), granted a city's outside counsel qualified immunity based on the phrase "behest of the sovereign." In *Cullinan*, 128 F.3d at 310, Plaintiffs were independent investment managers who handled a portion of the assets of a Louisville, Kentucky police fund that brought a federal civil rights/RICO lawsuit, now codified under 42 U.S.C. section 1983, against the city, its outside lawyers, the mayor, and other city officials, all of whom were said to have been involved in the efforts to have the plaintiffs fired as investment managers for the pension fund. All defendants moved for dismissal of the complaint under Federal Rules of Civil Procedure, Rule 12, asserting among other defenses, absolute and qualified immunity from suit on both the federal claims and numerous pendent state law claims by which the federal claims were accompanied. *Cullinan*, 128 F.3d at 310.

The District Court largely denied the motions to dismiss; however, the appellate court concluded that as attorneys for the city, the city's outside counsel, were clearly *acting as the city's agents*. *Cullinan*, 128 F.3d at 310. (Emphasis added). Citing *Richardson*, the *Cullinan* court determined that the rationales for the application of qualified immunity to the lawyers and their firm applied to the city's sometime law director (also a named defendant) in the same fashion. *Cullinan*, 128 F.3d at 310.

As was the case in *Cullinan*, Petitioner Filarsky was retained *to act as the City's agent* in its investigation of Respondent Delia. Petitioner Filarsky would not have been involved in Respondent Delia's investigation on an individual basis, had it not been at the specific request of the City. Accordingly, Petitioner Filarsky was entitled to the protection of qualified immunity to the same extent any city official would be. *See Cullinan v. Abramson*, 128 F.3d 301, 310 (6th Cir. 1997) holding that "the rationales for qualified immunity apply to [private] lawyers and their firms in about the same way they apply to [the government attorney]."

The *Cullinan* decision is therefore correct under *Richardson* 521 U.S. at 412-413, holding it had answered the question of *not* extending qualified immunity narrowly to the facts of its case: "[s]econd, we have answered the immunity question narrowly, in the context in which it arose. That context is one in which a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertakes that task for profit and potentially in competition with other firms. The case does not involve a private individual briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision." *Richardson* therefore emphasized how narrow a question this Court was answering in dealing *only* with private defendants invoking a state replevin, garnishment, or attachment statute and wisely leaving open the door for the opportunity to extend qualified immunity to private individuals working "at the behest of a sovereign" when "special circumstances" were present. *Richardson,* 521 U.S. at 407.

The Ninth Circuit's opinion serves as a blanket denial of qualified immunity to private individuals merely on their *status* as a private party as opposed to whether their function serves the *purposes* of the doctrine of qualified immunity. *Richardson,* 521 U.S. at 431. As such, this Ninth Circuit opinion serves as an automatic disqualification of a private party's right to assert the defense of qualified immunity in 42 U.S.C. section 1983 lawsuits in this jurisdiction, which is at odds with the application of qualified immunity to private parties in 42 U.S.C. section 1983 in the Sixth Circuit.

Moreover, the Ninth Circuit's reliance on *Gonzalez v. Spencer,* 336 F.3d 832 (9th Cir. 2003) is wholly misplaced given that it provides absolutely no reasoning for its decision. In *Gonzalez,* the plaintiff brought suit against the attorney, her law firm, and the county "for accessing and using his juvenile court file without authorization" and alleged this conduct constituted a violation of his *Fourth Amendment* rights. *Id.* In rejecting the attorney's claim of qualified immunity, the Ninth Circuit stated in *two sentences*, "[the attorney] is not entitled to qualified immunity. She is a private party, not a government employee, and she has pointed to 'no special reasons significantly favoring an extension of governmental immunity' to private parties in her position." *Id.* at 835 (quoting *Richardson*, 521 U.S. at 412). The clear implication in this terse two sentence edict is that the issue of qualified immunity would have been decided differently if the attorney *had* pointed to such special reasons; however, appellant's counsel in *Gonzalez* neglected to cite to this Court's acknowledgment in *Richardson* of the long history of immunity provided to attorneys in her position. Consequently, the Ninth Circuit panel simply never considered the *Richardson* factors or "special reasons," and did not take into account the long tradition of extending the protection of qualified immunity to lawyers under such circumstances. In fact, the Ninth Circuit panel in *Gonzalez* had no reason to even address the issue of qualified immunity at all, inasmuch as the court expressly found appellant's conduct to constitute a violation of a "clearly established" right, thereby rendering the doctrine of qualified immunity inapplicable on its face.

Nevertheless, relying only upon *Gonzalez v. Spencer*, 336 F.3d 832 (9th Cir. 2003) the Ninth Circuit panel concluded that because Petitioner Filarsky did not allege "any intervening legislation, *en banc* decision or Supreme Court decision that would allow the court to overrule the decision in *Gonzalez* and therefore Filarsky is not entitled to qualified immunity." App., *infra*, 25-26.

Other lower courts have varied widely in applying *Richardson* as stated in the Harvard Law Review article published in the scholarly treatise, *Developments in the Law: State Action and the Public Private Distinction: Private Party Immunity from Section 1983 Suits,* 123 Harvard Law Review 1266 (March 2010). This treatise notes:

> Seven Circuits have used *Richardson* as a test, refusing to grant private actors qualified immunity in any circumstances. While only one Circuit has explicitly granted private actors qualified immunity under *Richardson*, others have arguably done so implicitly, so immunity is not always categorically precluded. One Circuit has held that qualified immunity applied in every case it has considered, even though it has not relied on *Wyatt* or *Richardson*. The remaining four

Circuits have no holding applying *Richardson*. Much litigation continues at the district court level without circuit-wide resolution. 123 Harvard Law Review at p. 1271.

The Sixth Circuit holding in *Cullinan v. Abramson*, 128 F.3d 301 (6th Cir. 1997) and the recent treatise cited above state persuasive reasons why this Court should grant this petition for writ of certiorari in order to re-examine and clarify the *Richardson* factors and finally explain how they relate, how they are to be applied, and which are dispositive for extending the protection of qualified immunity to government retained "private" lawyers as expressly left open in *Richardson*.

◆

CONCLUSION

The issue before this Court is the applicability of the doctrine of qualified immunity to "private" government retained lawyers such as Petitioner Filarsky. Petitioner Filarsky has been found to be a state actor for purposes of 42 U.S.C. section 1983 liability, and at the same time is now being denied the right to assert qualified immunity even though City employees engaging in precisely the same conduct were entitled to do so. App., *infra*, 6-7, 54, 58-59, 88-89. As such, a grave injustice has been created by this Ninth Circuit opinion, which, if permitted to stand, will adversely affect the practice of law by private lawyers in the public sector across the nation.

Accordingly, for the foregoing reasons, Petitioner Filarsky urges that this petition for a writ of certiorari be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NICHOLAS B. DELIA,
Plaintiff-Appellant,

v.

CITY OF RIALTO, a Public Entity; CITY OF RIALTO FIRE DEPARTMENT, a Public Agency; STEPHEN C. WELLS, Individually and as the Fire Chief for the City of Rialto; MIKE PEEL, Individually and as Battalion Chief for the City of Rialto; FRANK BEKKER, Individually and as Battalion Chief for the City of Rialto; STEVE A. FILARSKY, Individually and as an Internal Affairs Investigator for the City of Rialto,
Defendants-Appellees.

No. 09-55514

D.C. No.
2:08-cv-03359-R-PLA

ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING EN BANC AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted
June 11, 2010 – Pasadena, California

Filed September 9, 2010
Amended November 8, 2010

Before: Alfred T. Goodwin, Johnnie B. Rawlinson,
Circuit Judges, and
Mark W. Bennett, District Judge.*

Opinion by Judge Bennett

COUNSEL

Michael A. McGill and Carolina V. Diaz of Lackie, Dammeier & McGill, Upland, California, for appellant Nicholas B. Delia.

Howard B. Golds and Cynthia M. Germano of Best Best & Kreiger, L.L.P., Riverside, California, for appellees City of Rialto, City of Rialto Fire Department, Stephen C. Wells, Mike Peel and Frank Bekker.

Jon H. Tisdale and Jennifer Calderon of Gilbert, Kelly, Crowley & Jennett, Los Angeles, California, for appellee Steve A. Filarsky.

ORDER

The opinion filed September 9, 2010, is amended as follows:

Slip Opinion page 13785, first full paragraph, lines 7-8 replace "knew they could not directly do without clearly violating the Fourth Amendment" with "declined to do directly."

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* The Honorable Mark W. Bennett, United States District Judge for the Northern District of Iowa, sitting by designation.

With that amendment, Judge Rawlinson voted, and Judges Goodwin and Bennett recommended, to deny the Petition for Rehearing En Banc.

The full court has been advised of the Petition for Rehearing En Banc, and no judge of the court has requested a vote.

Appellee Steve A. Filarsky's Petition for Rehearing En Banc filed on October 8, 2010, is **DENIED**.

Future petitions for rehearing and rehearing en banc will not be entertained.

OPINION

BENNETT, District Judge:

Appellant Nicholas B. Delia ("Delia"), a firefighter, brought this 42 U.S.C. § 1983 action against the City of Rialto, the Rialto Fire Department, Rialto Fire Chief Stephen C. Wells, two Rialto Fire Department Battalion Chiefs, Mike Peel and Frank Bekker, and a private attorney, Steve Filarsky. Delia alleges violations of his constitutional rights arising during a departmental internal affairs investigation. While being represented by counsel and interrogated at headquarters, he was ordered to go directly to his home while being followed by Battalion Chiefs Peel and Bekker in a City vehicle. He was ordered that when he arrived at his home he was to enter his home while in full view of the Battalion Chiefs, retrieve several rolls of recently purchased insulation, and bring them out of the house and place them in his front yard for inspection by the Battalion Chiefs. Delia was told earlier in the interview that if he failed to do this he could be found to be "insubordinate" and subject to disciplinary action including termination. This order was given a few minutes after Delia and his counsel refused to consent to a warrantless search of his home by Battalion Chief Peel.[1]

The district court granted summary judgment in favor of all defendants. In a written order, the district court held that all of the individual defendants were entitled to qualified immunity. The district court also found that the City of Rialto ("the City") could not be held liable under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). This was because Delia failed to show that a municipal policy caused his injury. This timely appeal followed. We have jurisdiction pursuant to 28 U.S.C. § 1291.

For the reasons discussed below, we conclude that Delia's constitutional right under the Fourth Amendment of the United States Constitution to be protected from a warrantless unreasonable compelled search of his home was violated. However, because we also conclude that this right, under these or similar facts, was not clearly established at the time of this constitutional violation, we affirm the district court's order granting qualified immunity to Stephen Wells ("Chief Wells"), Mike Peel ("Peel"), and Frank Bekker ("Bekker"). We also affirm the district court's grant of summary judgment to the City on Delia's *Monell* claim, but reverse the district court's grant of qualified immunity to Steve Filarsky ("Filarsky") and remand for further proceedings.

---

[1] Delia asserts in his complaint that defendants' actions violated his right to be free from unreasonable search and seizures under the Fourth and Fourteenth Amendments. He also asserts that defendants violated his right to be free from invasions of privacy under the First, Fifth and Fourteenth Amendments. In this appeal, however, he claims only violations of his Fourth and Fourteenth Amendment rights.

I. BACKGROUND

A. Work Incident And Its Aftermath

In July 2000, Delia was hired by the City's Fire Department as a firefighter. He was later promoted to the rank of engineer. As a result of a disciplinary decision against him, he was demoted back to firefighter in June 2006. On August 10, 2006, Delia began to feel ill while working to control a toxic spill. He was then transported to a hospital emergency room for evaluation. There, a doctor gave him an off-duty work order for three work shifts. The doctor, however, did not place any activity restrictions on Delia.

On August 15, 2006, Delia returned to the hospital. The doctor again issued him an off-duty work order. This time it was for eight shifts. The doctor also scheduled a medical test for him. Again, the doctor did not place any activity restrictions on Delia. On August 22, 2006, Delia returned to the hospital and the doctor gave him an off-duty work order for eight shifts. Once again, no activity restrictions were placed on Delia. Shortly after this examination, Delia underwent a colonoscopy and endoscopy. He was diagnosed with esophagitis, an ulceration of the esophagus. On August 29, 2006, Delia's doctor issued an off-duty work order for the period of August 29, 2006, through September 3, 2006. The doctor cleared him to return to work after September 3, 2006.

The City was suspicious of Delia's off-work status due to his disciplinary history. The record reveals that Delia was previously disciplined for sending improper e-mails. Why this would make the City suspicious of Delia's off-work activities is not readily apparent. In any event, the City hired a private investigation firm to conduct surveillance on Delia. During this surveillance, Delia was filmed buying building supplies, including several rolls of fiberglass building insulation, at a home improvement store. Based on these observations, the City began a formal internal affairs investigation of Delia to determine whether he was off-work on false pretenses. The City began its internal affairs investigation of Delia despite the fact that Delia had no activity restrictions placed on him by his treating physician and the City possessed no contrary evidence.

As part of the internal affairs investigation, Delia was ordered to appear, on September 18, 2006, for an administrative investigation interview. The interview was conducted by Filarsky, a private attorney retained by the City. Filarsky had previously represented the City in conducting interviews during internal affairs investigations.

B. The Internal Affairs Interview

Filarsky's interview of Delia was conducted on September 18, 2006. In addition to Filarsky and Delia, Delia's attorney, Stuart Adams, Peel and Bekker were also present at the interview. At the onset of the interview, Filarsky warned Delia that he was obligated to fully cooperate. Delia was further cautioned that "[i]f at any time it is deemed you are not cooperating then you can be held to be insubordinate and subject to disciplinary action, up to and including termination."

After some preliminary questions, Filarsky asked Delia about any home construction projects he was currently undertaking in his home. Delia answered that he had some duct work done in his home and had purchased some rolls of insulation. He told Filarsky that the rolls were currently sitting in his house. Filarsky showed Delia a videotape of him purchasing home construction materials, including the rolls of insulation, at a store. Filarsky asked Delia whether this insulation had been installed. Delia told Filarsky that it was still bagged at his house. Shortly after this line of questioning, Filarsky requested Delia and Adams step out of the interview room so he could confer with "the Chiefs." During this break, Filarsky consulted with Chief Wells concerning his desire to order Delia to produce the rolls of insulation for inspection. Chief Wells, who was never present during the interview with Delia, agreed to permit Filarsky to order Delia to produce the rolls of insulation.

Following the break, Filarsky asked Delia to allow Peel to follow him to his house and, once there, permit Peel to enter his home to conduct a warrantless search of the insulation there. On the advice of counsel, Delia refused Filarsky's request. Unable to get Delia to consent to a warrantless search of his house by Peel, Filarsky then asked if Delia would volunteer to have Peel follow him to his house, where Delia would bring out the rolls of insulation to show Peel that they had not been installed. Again, on the advice of his counsel, Delia refused Filarsky's request.

Unable to get Delia to volunteer, Filarsky orally ordered Delia to produce the rolls of insulation from his house. Adams, Delia's attorney, questioned Filarsky's legal authority for issuing such an order and requested that the order be in writing. Following a lengthy break, Delia was presented with a written order to produce the insulation for inspection signed by Chief Wells. The interview then concluded.

C. The Search And Resulting Lawsuit

Immediately after the interview, Peel and Bekker followed Delia, in a city vehicle, to Delia's house. Once there, Peel and Bekker parked alongside the curb in front of Delia's house, and waited a few minutes for Adams to arrive. Peel and Bekker never left their vehicle. After Adams arrived, he, Delia, and a union representative went into Delia's house and brought out three or four rolls of insulation and placed them on his lawn. After Delia brought out the last roll of insulation, Peel thanked him for showing them the insulation and the two drove off. On May 21, 2008, Delia filed this lawsuit. Defendants subsequently moved for summary judgment. At the hearing on defendants' motions for summary judgment, the district court orally granted defendants' motions. The court found that Delia had not established municipal liability against the City. The court concluded that Delia had failed to show that he was injured by an express policy, a longstanding custom, or an official with final policymaking authority. The district court also found that the individual defendants, Chief Wells, Peel, and Bekker were entitled to qualified immunity. However, with respect to Filarsky, the court stated:

> As to Defendant Filarsky, the evidence establishes that Filarsky's conduct did not result in the deprivation of any constitutional right required – as a required element for a 1983 claim. Filarsky's conduct consisted of conducting the interview, arguing with Delia's attorney, and consulting with Fire Chief Wells, who then issued the written order. Filarsky was not present at Delia's house, and at no point was Delia threatened with subordination [sic] or termination if he refused to comply with the order.

The district court's written order granting defendants' motions for summary judgment does not contain this holding.

The district court directed defense counsel to prepare findings of fact and conclusions of law. It appears from the record that the district court mechanically adopted the findings of fact and conclusions of law as prepared by defense counsel.[2] In its written order, the district court concluded that Filarsky, as well as Peel, Bekker and Chief Wells, was entitled to qualified immunity. No explanation for this change in the district court's reasoning appears in its written order.[3] The district court also held that the City was entitled to summary judgment on Delia's Monell claim. The district court, again, found that Delia had not established that he was injured by an express policy, a longstanding custom, or an official with final policymaking authority..

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[2] This court has previously noted its disapproval of this practice. *Federal Trade Comm'n v. Enforma Natural Prods., Inc.*, 362 F.3d 1204, 1215 (9th Cir. 2004); *Unt v. Aerospace Corp.*, 765 F.2d 1440, 1444 (9th Cir. 1985); *Lumbermen's Underwriting Alliance v. Can-Car, Inc.*, 645 F.2d 17, 18-19 (9th Cir. 1980); *Industrial Bldg. Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 1339 (9th Cir. 1970). As this court recognized forty years ago in *Interchemical Corp.*: "This practice has been condemned because of the possibility that such findings and conclusions, prepared by the non-objective advocate, may not fully and accurately reflect the thoughts entertained by the impartial judge at the time of his initial decision." *Interchemical Corp.*, 437 F.2d at 1339; *see also United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 657, n.4 (1964) (quoting Judge J. Skelly Wright's admonition, in his Seminars for Newly Appointed United States District Judges 166 (1963), that: "'lawyers, and properly so, in their zeal and advocacy and their enthusiasm are going to state the case for their side in these findings as strongly as they possibly can. When these findings get to the courts of appeals they won't be worth the paper they are written on as far as assisting the court of appeals in determining why the judge decided the case.'"); *Nissho-Iwai Co. v. Star Bulk Shipping Co.*, 503 F.2d 596, 598 (9th Cir. 1974) ("We are aware that busy judges sometimes request attorneys to prepare the first draft of proposed findings and conclusions. The vice is when the district judge fails to study them and make such changes as are necessary to be sure they reflect his opinion.").

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[3] The dangers of mechanically adopting counsel prepared summary judgment orders appear to be exemplified in this case. The district court's oral reasons for granting summary judgment do not match its written order. Yet, no explanation for this change appears in the record. Because the district court's written order postdates its oral statement, we will proceed on the presumption that the district court abandoned its prior oral reasoning for granting summary judgment. We will, instead, rely exclusively on the district court's written order. *See White v. Washington Public Power Supply Sys.*, 692 F.2d 1286, 1289 n.1 (9th Cir. 1982) (noting that "the rule in this circuit is that the formal findings of fact and conclusions of law supersede the oral decision."); *see also O'Neill v. AGWI Lines,* 74 F.3d 93, 95 (5th Cir. 1996) (noting that "to the extent that the district court's statements from the bench conflict with its formal findings and conclusions of law, we need not consider them."); *Snow Machines, Inc. v. Hedco, Inc.*, 838 F.2d 718, 727 (3d Cir. 1988) (noting that "a formal order controls over a prior oral statement."); *E.E.O.C. v. Exxon Shipping Co.*, 745 F.2d 967, 974 (5th Cir. 1984) (observing that "to the extent the [trial] court's statements from the bench conflict with its formal findings and conclusions, we do not consider them."); *Harbor Tug & Barge v. Belcher Towing,* 733 F.2d 823, 827 n.3 (11th Cir. 1984) ("The trial judge was not bound by his off-hand remarks. In its search for error, the reviewing court looks to the formal findings and conclusions . . . ").

II. STANDARD OF REVIEW

We review de novo the district court's grant of summary judgment. *Long Beach Area Chamber of Commerce v. City of Long Beach,* 603 F.3d 684, 689 (9th Cir. 2010). We must determine whether, viewing the evidence in the light most favorable to Delia, as the nonmoving party, "there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *California Alliance of Child and Family Servs. v. Allenby,* 589 F.3d 1017, 1020 (9th Cir. 2009).

III. DISCUSSION

A. Qualified Immunity – The City's Employees

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan,* 129 S. Ct. 808, 815 (2009) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)). In *Pearson,* the United States Supreme Court offered this explanation of the reasoning behind the concept of qualified immunity: "Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id.* In fact, "[t]he protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" *Pearson,* 129 S. Ct. at 815 (quoting *Groh v. Ramirez,* 540 U.S. 551, 567 (2004)) (Kennedy, J., dissenting).

In considering a claim for qualified immunity, the court engages in a two-part inquiry: whether the facts shown "make out a violation of a constitutional right," and "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Pearson,* 129 S. Ct. at 815-16. In *Pearson,* the Court overruled its prior holding, in *Saucier v. Katz,* 533 U.S. 194 (2001), that courts had to proceed through the two-step inquiry sequentially. *Pearson,* 129 S. Ct. at 818; *see James v. Rowlands,* 606 F.3d 646, 651 (9th Cir. 2010) (recognizing that *Pearson* overruled *Saucier* in part). As the Court explained, "while the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson,* 129 S. Ct. at 818. Thus, following *Pearson,* it is within our discretion to decide which step to address first. *Brooks v. Seattle,* 599 F.3d 1018, 1022 n.7 (9th Cir. 2010); *Bull v. City & County of San*

Francisco, 595 F.3d 964, 971 (9th Cir. 2010) (en banc). Thus, the threshold question we will decide is whether Delia being ordered to bring the rolls of insulation out of his home for inspection "make[s] out a violation of a constitutional right." *Pearson,* 129 S. Ct. at 816; *see Saucier,* 533 U.S. at 201.

1. Fourth Amendment violation

Delia contends that Chief Wells, Peel, and Bekker violated his Fourth Amendment right to be free from unreasonable searches and seizures when he was ordered to retrieve the rolls of home insulation and show them to fire department personnel. We agree. The Fourth Amendment, made applicable to the states through the Fourteenth Amendment, *Mapp v. Ohio,* 367 U.S. 643, 655 (1961), guarantees, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. The Supreme Court has held that the Fourth Amendment applies to "[s]earches and seizures by government employers or supervisors of the private property of their employees." *O'Connor v. Ortega,* 480 U.S. 709, 715 (1987).

In *Payton v. New York,* 445 U.S. 573 (1980), the Supreme Court explained that no zone of privacy is more clearly defined than one's home: "[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Id.* at 590; *see Kyllo v. United States,* 533 U.S. 27, 28 (2001) (observing that "search of a home's interior" is "the prototypical . . . area of protected activity . . . "); *Silverman v. United States,* 365 U.S. 505, 511 (1961) (observing that "[a]t the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."); *see also United States v. Struckman,* 603 F.3d 731, 738 (9th Cir. 2010) (recognizing the core of the Fourth Amendment is protection against unreasonable searches of one's home); *United States v. Brock,* 667 F.2d 1311, 1326 (9th Cir. 1982) (noting that "[o]ne of the foundations of the fourth amendment is the right of the people 'to be secure in their . . . houses.'"); *cf. New York v. Harris,* 495 U.S. 14, 17 (1990) ("[T]he rule in *Payton* was designed to protect the physical integrity of the home[.]"). Therefore, the warrantless search of a home is presumptively unreasonable unless the government can prove consent or that the search falls within one of the carefully defined sets of exceptions. *See Arizona v. Hicks,* 480 U.S. 321, 327 (1987); *Coolidge v. New Hampshire,* 403 U.S. 443, 474-75 (1971). The circumstances which excuse the failure to obtain a warrant are "'few in number and carefully delineated,'" where one's home is concerned.[4] *See Welsh v. Wisconsin,* 466 U.S. 740, 749

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[4] We note that the Supreme Court recently reemphasized that the "'special needs' of the workplace" constitute an exception to the general rule that warrantless searches "'are per se unreasonable under the Fourth Amendment' . . . " *Ontario v. Quon,* 130 S. Ct. 2619, 2630 (2010) (citation and internal quotations omitted). In *Quon,* the Court reviewed a disagreement in *O'Connor v. Ortega,* 480 U.S. 709 (1987), on the proper analytical framework for Fourth Amendment claims against government employers. *Quon,* 130 S. Ct. at 2628. Under one approach, representing the plurality opinion in *O'Connor,* the Court explained the plurality analysis has two steps:

> First, because "some government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable," *id.,* at 718, a court must consider "[t]he operational realities of the workplace" in order to determine whether an employee's Fourth Amendment rights are implicated, *id.,* at 717 . . . Next, where an employee has a legitimate privacy expectation, an employer's intrusion on that expectation "for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances."

Id. (quoting *O'Connor,* 480 U.S. at 717, 718, and 725-726). The competing approach, championed by Justice Scalia in his concurrence in *O'Connor,* "dispensed with an inquiry into 'operational realities' and would conclude 'that the offices of government employees . . . are covered by Fourth Amendment protections as a general matter.'" *Id.* (quoting *O'Connor,* 480 U.S. at 731). Thus, under Justice Scalia's approach, the core inquiry is whether the search would be "regarded as reasonable and normal in the private-employer context." *O'Connor,* 480 U.S. at 732. If so, the search does not violate the Fourth Amendment. *Id.* The Court did not resolve this schism in *Quon. Quon,* 130 S. Ct. at 2628. The *Quon-O'Connor* workplace

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(1984) (quoting *United States v. United States District Court,* 407 U.S. 297, 318 (1972)).

In this case, defendants initially attempted to conduct a warrantless search of Delia's house for the insulation by asking for Delia's consent. Presumably, this is because a search conducted with the home owner's voluntary consent is an exception to the Fourth Amendment's proscription on warrantless searches. *Schneckloth v. Bustamonte,* 412 U.S. 218, 219 (1973); *United States v. Rubio,* 727 F.2d 786, 796

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warrant exception, however, has no application here. Although the search at issue in this case arose as a result of a workplace investigation, defendants were not seeking to search Delia's workplace environment, but his home. *See Quon,* 130 S. Ct. at 2633 (concerning search of messages made by police officer on government owned alphanumeric pager); *O'Connor,* 480 U.S. at 712-13 (concerning search of physician's state office and seizure of personal items from his desk and filing cabinet). Moreover, even if the *Quon-O'Connor* workplace warrant exception was applicable to the search here, the search was unreasonable under either the *O'Connor* plurality or Justice Scalia's approach. Under the *O'Connor* plurality approach, the search here was unjustified from the start because there were no reasonable grounds for believing that a search for the insulation was necessary for the investigation. Delia was being investigated for abuse of sick leave. However, no activity restrictions were ever placed on Delia by his treating physician as a result of his workplace exposure to the hazardous substances. Consequently, whether or not he installed insulation in his home was irrelevant to the investigation, since he could install insulation in his home and still be in full compliance with his physician's orders. For these same reasons, we also conclude that the search would fail to satisfy Justice Scalia's approach because it would not be "regarded as reasonable and normal in the private-employer context." *O'Connor,* 480 U.S. at 732.

(9th Cir. 1983). Filarsky asked Delia to consent to allowing Peel to search for the insulation. Delia, however, refused to consent. Unable to obtain Delia's consent to a warrantless search of his house by Peel, Filarsky tried a different tactic. He sought to obtain Delia's consent to Delia bringing the rolls of insulation out of his home to show Peel that they had not yet been installed. No doubt this was done because an individual does not have an expectation of privacy in items exposed to the public, thereby eliminating the need for a search warrant. *See Katz v. United States,* 389 U.S. 347, 351 (1967) ("[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."); *see also United States v. Broadhurst,* 805 F.2d 849, 856 (9th Cir. 1986) ("What a person knowingly exposes to public view is not protected by the Fourth Amendment"). Delia, however, again rejected Filarsky's request.

Unable to obtain Delia's consent to search his home, and alternatively, failing to persuade Delia to voluntarily retrieve the insulation from his home and place it in public view on his front lawn, Filarsky was stymied. It was only at this juncture that Filarsky's final move was to hatch a plan to compel Delia to do indirectly what Filarsky and the City of Rialto officials declined to do directly. Delia was *ordered* to go into his house and bring out the rolls of insulation for inspection. He was cautioned at the beginning of his interview that his failure to cooperate with the investigation could result in charges of insubordination and possible termination of his employment. As a result, Chief Wells's order "convey[ed] a message that compliance with [his] request[ ][was] required." *Florida v. Bostick,* 501 U.S. 429, 435 (1991). As this court has recognized in the situation where police demand entrance to a dwelling, "compliance with a [governmental] demand is not consent." *United States v. Winsor,* 846 F.2d 1569, 1573 n.3 (9th Cir. 1988) (en banc) (internal quotations omitted). In *Winsor,* police officers decided to enter a hotel and go from room to room looking for a robbery suspect. *Id.* at 1571. "When the police knocked on the door [of the defendants' room] and demanded that it be opened," one of the defendants obeyed, at which point, the police officers recognized the suspect as the robber and found evidence of the robbery in plain view. *Id.* This court found that the defendant had opened the door in response to a claim of lawful authority, not voluntarily. *Id.* at 1573. Consequently, this court held that "the police did effect a 'search' when they gained visual entry into the room through the door that was opened at their command." *Id.* Similarly, under the facts in this case, Delia was compelled to enter his own home and retrieve the insulation for public view by *order* of Chief Wells. Delia's actions were involuntary and coerced by the direct threat of sanctions including loss of his firefighter position.[5] Therefore,

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[5] It is well established that public employers generally cannot condition employment on an employee's waiver of

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we hold that the warrantless compelled search of Delia's own home, requiring him to retrieve and display the insulation in public view on his front yard, violated Delia's right under the Fourth Amendment to be free from an unreasonable search of his home by his employer.

2. *Clearly established right*

Having found that Delia's Fourth Amendment rights were violated, we turn to the second prong of the qualified immunity inquiry, whether the right was clearly established at the time of the defendants' misconduct. Accordingly, we must focus on what the defendants' knew, or should have known, concerning Delia's Fourth Amendment constitutional rights as of September 18, 2006, the date of Chief Wells's order. Whether a right is clearly established "turns on the 'objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.'" *Pearson,* 129 S. Ct. at 822 (quoting *Wilson v. Layne,* 526 U.S. 603, 614 (1999)); *see Clouthier v. County of Contra Costa,* 591 F.3d 1232, 1241 (9th Cir. 2010); *Greene v. Camreta,*

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constitutional rights. *See O'Hare Truck Serv., Inc. v. City of Northlake,* 518 U.S. 712, 717 (1996); *Pickering v. Board of Educ.,* 391 U.S. 563, 568 (1968); *Vance v. Barrett,* 345 F.3d 1083, 1092 (9th Cir. 2003); *see also McDonell v. Hunter,* 809 F.2d 1302, 1310 (8th Cir. 1987) (holding that the state may not require, as a condition of employment, waiver of the Fourth Amendment right to be free from unreasonable searches).

588 F.3d 1011, 1031 (9th Cir. 2009). Delia bears the burden of demonstrating that the right allegedly violated was clearly established at the time of the incident. *See Greene,* 588 F.3d at 1031; *Robinson v. York,* 566 F.3d 817, 825 (9th Cir. 2009), *cert. denied,* 130 S. Ct. 1047 (2010); *Galen v. County of Los Angeles,* 477 F.3d 652, 665 (9th Cir. 2007). The "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640 (1987); *see James,* 606 F.3d at 652.

This case does not fit neatly into any previous category of Fourth Amendment law. This is best demonstrated by the fact that no party provided any prior case law analogous to this situation. Moreover, until today, this court had not extended *Winsor* beyond situations where police demand entrance. In attempting to demonstrate that the right allegedly violated was clearly established at the time of Chief Wells's order, Delia cites several cases. These cases include this court's prior decision in *Los Angeles Police Protective League v. Gates,* 907 F.2d 879 (9th Cir. 1990), as well as the Supreme Court's decisions in *Uniformed Sanitation Men Ass'n, Inc. v. Commissioner of Sanitation,* 392 U.S. 280 (1968) and *Gardner v. Broderick,* 392 U.S. 273 (1968). A review of these decisions, however, does not demonstrate that Chief Wells's order violated a clearly established right.

Both Supreme Court decisions concern municipal employees who were questioned about corruption in their agencies. In *Gardner,* the plaintiff, a police officer, was subpoenaed to appear before a New York County grand jury that was investigating bribery and corruption of police officers in connection with gambling operations. *Gardner,* 392 U.S. at 274. Although he was informed of his privilege against self-incrimination, the police officer was told that he would be fired if he did not sign a waiver of immunity. *Id.* After he refused to sign the waiver, he was fired. *Id.* at 274-753. The Court held that the plaintiff was discharged "not for failure to answer relevant questions about his official duties, but for refusal to waive a constitutional right. . . . He was dismissed solely for his refusal to waive the immunity to which he is entitled if he is required to testify despite his constitutional privilege." *Id.* at 2789.

The Court reached an identical conclusion in *Uniformed Sanitation Men,* decided the same day as *Gardner.* In *Uniformed Sanitation Men,* fifteen sanitation workers were summoned to appear at a hearing conducted by a commissioner of investigations. The commissioner was investigating charges that sanitation department employees were not charging certain fees and were keeping other fees for themselves. *Uniformed Sanitation Men Ass'n, Inc.,* 392 U.S. at 281. Each sanitation employee was told that if he refused to testify "his employment and eligibility for other city employment would terminate." *Uniformed Sanitation Men Ass'n, Inc.* 392 U.S. at 282. Twelve workers refused to answer, invoking their privilege against self-incrimination, and were discharged. *Id.* The remaining three workers answered questions at the hearing. They were subsequently suspended as a result of "information received from the Commissioner of Investigation concerning irregularities arising out of (their) employment in the Department of Sanitation." *Id.* The three workers were later summoned before a grand jury and asked to sign waivers of immunity. *Id.* They refused and were fired solely for refusing to sign waivers of immunity. *Id.* at 282-83. The Supreme Court held all the discharges unconstitutional, noting that, "[the sanitation workers] were not discharged merely for refusal to account for their conduct as employees of the city. They were dismissed for invoking and refusing to waive their constitutional right against self-incrimination." *Id.* at 283. Thus, in both *Gardner* and *Uniformed Sanitation Men,* the Court held that public agencies may not impair an individual's privilege against self-incrimination by compelling incriminating answers, or by requiring a waiver of immunity. *See id.*; *Gardner,* 392 U.S. at 278. Neither case involved the legality of a search under the Fourth Amendment. Accordingly, neither *Gardner* nor *Uniformed Sanitation Men* would have put defendants on notice that Chief Wells's order to Delia, with no attendant threat to his employment, constituted a violation of the Fourth Amendment.

Delia also cites this court's decision in *Gates.* In *Gates,* a police officer was served with an administrative warrant to search his garage. *Gates,* 907 F.2d at 883. When the plaintiff refused to permit the search, he was fired for insubordination. *Id.* Relying on the

Supreme Court's decisions in *Gardner* and *Uniformed Sanitation Men,* this court held that the plaintiff "could not be disciplined when he refused to allow the appellants to violate his constitutional rights. As the Supreme Court has pointed out, it is not proper to discharge an officer from duty in order to punish that officer for exercising rights guaranteed to him under the constitution." *Id.* at 886. Thus, the *Gates* decision did not concern the legality of an actual search, let alone a "search" under circumstances similar to this case. As a result, the *Gates* decision, like the Supreme Court's decisions in *Gardner* and *Uniformed Sanitation Men,* would hardly have put defendants on notice that their conduct here violated the Fourth Amendment. Thus, Delia has not demonstrated that a constitutional right was clearly established as of the date of Chief Wells's order, such that defendants would have known that their actions were unlawful. Accordingly, we affirm the district court's grant of summary judgment in favor of Chief Wells, Peel, and Bekker on the ground of qualified immunity.

B. Qualified Immunity – Filarsky

We next take up the issue of whether Filarsky, too, is entitled to qualified immunity. Unlike the other individual defendants in this case, Filarsky is not an employee of the City. Instead, he is a private attorney, who was retained by the City to participate in internal affairs investigations. Delia contends that Filarsky, as a private attorney, is not entitled to qualified immunity. Filarsky, on the other hand, argues that this is a distinction without a difference. He urges this court to follow the Sixth Circuit Court of Appeals's decision in *Cullinan v. Abramson,* 128 F.3d 301, 310 (6th Cir. 1997), and hold that he is entitled to qualified immunity. In *Cullinan,* the Sixth Circuit held that a law firm that had been hired by the City of Louisville to serve as outside counsel was entitled to qualified immunity against plaintiffs' § 1983 claims. *Id.* The court succinctly concluded: "We see no good reason to hold the city's in-house counsel eligible for qualified immunity and not the city's outside counsel." *Id.* In arriving at this conclusion, the court of appeals relied exclusively on dictum in *Richardson v. McKnight,* 521 U.S. 399, 407 (1997), that "the common law '*did* provide a kind of immunity for certain private defendants, such as doctors or lawyers who performed services at the behest of the sovereign.'" *Cullinan,* 128 F.3d at 310.

The hitch in Delia's argument is that we are not free to follow the *Cullinan* decision. We are "bound by prior panel opinions 'unless an en banc decision, Supreme Court decision or subsequent legislation undermines those decisions.'" *In re Findley,* 593 F.3d 1048, 1050 (9th Cir. 2010) (quoting *Nghiem v. NEC Elec., Inc.,* 25 F.3d 1437, 1441 (9th Cir. 1994); *Robbins v. Carey,* 481 F.3d 1143, 1149 n.3 (9th Cir. 2007)) ("Ordinarily, panels cannot overrule a circuit precedent; that power is reserved to the circuit court sitting en banc."). In *Gonzalez v. Spencer,* 336 F.3d 832 (9th Cir. 2003), another panel of this court held that a private attorney representing a county was not entitled to qualified immunity. *Id.* at 834-35. In *Gonzalez,* the defendant, a private attorney, was retained to defend Los Angeles County in an underlying civil rights suit brought by the plaintiff. *Id.* at 834. The attorney accessed the plaintiff's juvenile court file without notifying him and without obtaining authorization from the juvenile court. *Id.* The attorney employed information from the file in deposing the plaintiff. *Id.* The plaintiff brought suit against the attorney, her law firm, and the county "for accessing and using his juvenile court file without authorization." *Id.* The plaintiff alleged that this conduct constituted a violation of his Fourth and Fourteenth Amendment rights. *Id.* In rejecting the attorney's claim of qualified immunity, this court reasoned, "[the attorney] is not entitled to qualified immunity. She is a private party, not a government employee, and she has pointed to 'no special reasons significantly favoring an extension of governmental immunity' to private parties in her position." *Id.* at 835 (quoting *Richardson,* 521 U.S. at 412); *see Wyatt v. Cole,* 504 U.S. 158, 168-69 (1992) (holding that private defendants in § 1983 suit for "invoking a state replevin, garnishment, or attachment statute" later declared unconstitutional were not entitled to qualified immunity from suit); *cf. Pollard v. The Geo Group, Inc.,* 607 F.3d 583, 602 (9th Cir. 2010) (observing that "[u]nlike officers employed by public prisons," employees of a private corporation operating a federal prison would not be entitled to qualified immunity in *Bivens* cause of action); *Kimes v. Stone,* 84 F.3d 1121, 1128 (9th Cir. 1996) (holding that "the common law did not provide immunity to private attorneys conspiring with a judge to deprive someone of their constitutional rights"). Filarsky does not allege any intervening en banc decision, Supreme Court decision, or intervening legislation which would permit us to overrule the holding in *Gonzalez*. Therefore, we are bound by the *Gonzalez* decision. Accordingly, Filarsky is not entitled to qualified immunity as a private attorney and we reverse the district court's grant of summary judgment in his favor and remand for trial, or further proceedings as determined by the district court.[6]

C. Municipal Liability

Finally, we consider whether the City may be held liable under § 1983 for the individual defendants' actions. The City may be held liable under § 1983 for its employees' actions where one of its customs or policies caused a violation of Delia's constitutional rights. *Monell,* 436 U.S. at 690-91. In *Monell,* the United States Supreme Court held that municipalities are "persons" subject to damages liability under § 1983 where it has caused a constitutional tort through "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.* at 690. The Court further observed that § 1983 also authorizes suit "for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." *Id.* at 690-691. The Court, however, specifically rejected the use of the doctrine of *respondeat superior* to hold a municipality liable for the unconstitutional acts of its employees. The Court instructed that municipalities could be held liable only when an injury was inflicted by a city's "law-makers or by those whose edicts or acts may fairly be said to represent official policy." *Id.* at 694. "[T]he touchstone of 'official policy' is designed 'to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible.'" *City of St. Louis v. Praprotnik,* 485 U.S. 112, 138 (1988) (Brennan, J., concurring) (quoting *Pembaur v. City of Cincinnati,* 475 U.S. 469, 479-80 (1986)) (emphasis in *Pembaur*).

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[6] We are skeptical of the district court's oral holding that Filarsky has no responsibility for the deprivation of Delia's Fourth Amendment rights which occurred in this case. We leave to the district court on remand to determine Filarsky's liability consistent with this opinion. We do note that searches by private parties are subject to the Fourth Amendment if private parties act as agents of the government. *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 614 (1989); *United States v. Young*, 153 F.3d 1079, 1080 (9th Cir. 1998). Under § 1983, private parties acting under color of state law can be held liable for violations of federal constitutional rights. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970); *Franklin v. Fox*, 312 F.3d 423, 444 (9th Cir. 2002).

Even in the absence of an official policy or a custom, the Supreme Court has held that "an unconstitutional government policy could be inferred from a single decision taken by the highest officials responsible for setting policy in that area of the government's business." *Praprotnik,* 485 U.S. at 123. Under this paradigm, however, "[m]unicipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered." *Pembaur,* 475 U.S. at 481.

Thus, in order to establish an official policy or custom sufficient for *Monell* liability, a plaintiff must show a constitutional right violation resulting from (1) an employee acting pursuant to an expressly adopted official policy; (2) an employee acting pursuant to a longstanding practice or custom; or (3) an employee acting as a "final policymaker." *Webb v. Sloan,* 330 F.3d 1158, 1164 (9th Cir. 2003); *see Ulrich v. City & County of San Francisco,* 308 F.3d 968, 984-85 (9th Cir. 2002); *Gillette v. Delmore,* 979 F.2d 1342, 1346-47 (9th Cir. 1992). Delia has not directed us to any policy, officially adopted and promulgated by the City. Nor has he established a practice, so permanent and well-settled so as to constitute a custom, that existed and through which Chief Wells acted in ordering Delia to produce the rolls of insulation. *See Praprotnik,* 485 U.S. at 121. Indeed, Delia does not suggest that defendants were acting pursuant to an express official policy or a longstanding practice or custom.

This leaves only the third means of establishing municipal liability available to Delia, that he was injured by an employee of the City with "final policymaking authority." *Id.* at 123. Delia asserts that the individual defendants, and Chief Wells in particular, were acting as final policymakers when ordering him to produce the rolls of insulation. In response, the City argues that none of the individual defendants had final policymaking authority. "[W]hether a particular official has 'final policymaking authority' is a question of state law." *Praprotnik,* 485 U.S. at 124; *see Pembaur,* 475 U.S. at 483 (noting that "[a]uthority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority"); *Jett v. Dallas Indep. Sch. Dist.,* 491 U.S. 701, 737 (1989) ("'whether a particular official has 'final policymaking authority' is a question of *state law.*'") (quoting *Praprotnik,* 485 U.S. at 123); *Lytle v. Carl,* 382 F.3d 978, 982 (9th Cir. 2004) ("To determine whether a school district employee is a final policymaker, we look first to state law.").

Review of the City's Code of Ordinances reveals that the Fire Chief has not been delegated final policymaking authority regarding any practices for the City's Fire Department. Instead, the City Council is vested with exclusive final policymaking authority for the Fire Department. Rialto Ordinance Chapter 2.34 governs the City's Fire Department. Section 2.34.020 provides:

> The fire department is a department within the framework of the city's administrative organization and is governed by state

> and federal laws pertaining thereto and the ordinances, *policies and procedures established by the city council.*

RIALTO, CAL., ORDINANCES § 2.34.020 (emphasis added). Section 2.34.030, which concerns the establishment of a Fire Chief, provides:

> There is a chief of the fire department who is subject to the general supervision of the city administrator and *with the approval of the city council,* solely responsible for the management and conduct of the department.

RIALTO, CAL., ORDINANCES § 2.34.030 (emphasis added). Finally, § 2.34.040 specifies the duties of the City's Fire Chief, providing in pertinent part as follows:

> The duties of the fire chief include, but are not limited to, the following:
>
> A. To *formulate and recommend policies and procedures* pertaining to the enforcement of rules and regulations for the government and operation of the fire department and pertaining to the prevention and control of fires; to administer such policies and procedures *when approved* and to conduct such activities for the city;
>
> . . . .
>
> H. To carry out such other affairs and assignments *as he/she is assigned by the city council by resolution,* or to carry out

> other functions as described of the fire chief in other provisions of this code;
>
> I. To be responsible for the general supervision and administration of the fire safety division.

RIALTO, CAL., ORDINANCES § 2.34.020 (emphasis added).

Thus, under these ordinances, even though Chief Wells had final authority over the fire department's day-to-day supervision and administration, he was not authorized to establish city policy. In *Pembaur*, the Supreme Court distinguished final policymaking authority from final decisionmaking authority, observing that:

> The fact that a particular official – even a policymaking official – has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable.

Pembaur, 475 U.S. at 481-83 (citations and footnote omitted). To drive home this point, the Court offered the following illustration:

> Thus, for example, the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment

> policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff *is* the official policymaker, *would* give rise to municipal liability. Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board. However, if the Board delegated its power to establish final employment policy to the Sheriff, the Sheriff's decisions *would* represent county policy and could give rise to municipal liability.

Pembaur, 475 U.S. at 483 n.12.

The facts here mirror the *Pembaur* illustration. Chief Wells clearly had supervisory and final decisionmaking authority over the City's Fire Department. In that capacity, he signed the order requiring Delia to produce the rolls of insulation. The record, however, is devoid of any evidence that Chief Wells's authority included responsibility for establishing final departmental policy. To the contrary, the City's Code of Ordinances places policymaking authority for the fire department in the exclusive hands of the city council. *See* RIALTO, CAL., ORDINANCES §§ 2.34.020, 2.34.030. Thus, only the city council's decisions would provide a basis for city liability. No such decisions appear in the record. As the Supreme Court cautioned in *Praprotnik,* "a federal court would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it." *Praprotnik,* 485 U.S. at 128.

Delia directs our attention to the fact that Chief Wells did not provide the city administrator with a copy of his order to Delia as evidence that he wielded final policymaking authority. This argument confuses final decisionmaking authority with final policymaking authority. While Chief Wells wielded the former, only the latter is sufficient to hold the City liable under § 1983 for his actions. *See Pembaur,* 475 U.S. at 483 & n.12. Indeed, if we were to accept the evidence in this case as establishing *Monell* liability, "the result would be indistinguishable from respondeat superior liability." *Praprotnik,* 485 U.S. at 126 (cautioning that "[i]f the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from *respondeat superior* liability."); *see Clouthier,* 591 F.3d at 1253 (noting that "'[t]o hold cities liable under section 1983 whenever policymakers fail to overrule the unconstitutional discretionary acts of subordinates would simply smuggle *respondeat superior* liability into section 1983 law [creating an] end run around *Monell.*'") (quoting *Gillette,* 979 F.2d at 1348). Accordingly, we conclude that the evidence here fails to establish that Chief Wells had final policymaking authority.

Our conclusion is buttressed by cases from this court as well as our sister circuits. In *Gillette,* 979 F.2d 1342, this court held a fire chief's actions in firing the plaintiff could not constitute the basis for municipal liability because the fire chief was not a final policymaker. *Id.* at 1350. In arriving at this conclusion, this court observed that the fire chief's discretionary authority to hire and fire employees, standing alone, was "not sufficient to establish a basis for municipal liability." *Id.* This court also noted the fact that the "City Charter and ordinances grant authority to make City employment policy *only* to the City Manager and the City Council." *Id.* (emphasis added). In the absence of any evidence that the fire chief actually made policy, this court found that he was not a final policymaker. *Id.*; *see Collins v. City of San Diego,* 841 F.2d 337, 341-42 (9th Cir. 1988) (holding city was not liable for employment actions of police sergeant, even though police sergeant had "discretion to recommend hiring, firing, and discipline of employees", where he was not the city official responsible for establishing final departmental employment policy). The Eighth Circuit Court of Appeals reached the same conclusion in *Davison v. City of Minneapolis,* 490 F.3d 648, 661 (8th Cir. 2007). In *Davison,* the court held that there was insufficient evidence to subject the city to *Monell* liability for the actions of its fire chief. *Id.* In reaching this conclusion, the court noted that although the fire chief had final decisionmaking authority regarding employment promotions, there was no evidence that he was also delegated with authority to make final municipal policy regarding employment practices. *Id.*; *see Bechtel v. City of Belton,* 250 F.3d 1157, 1161 (8th Cir. 2001) (holding that city fire chief whose authority over the operations of the fire department was subject to review by the city administrator "had no authority as the 'highest official responsible for setting policy.'").

Likewise, in *Greensboro Prof'l Fire Fighters Ass'n, Local 3157 v. City of Greensboro,* 64 F.3d 962 (4th Cir. 1995), the Fourth Circuit Court of Appeals arrived at the identical determination. In that case, a firefighter sued the City of Greensboro under § 1983, alleging retaliation by the fire chief because of the firefighter's union participation. *Id.* at 963-64. The fire chief had failed to promote him despite the fact that he had the highest score on the promotions list. *Id.* Examining relevant state and city laws, the Fourth Circuit found that "'final policymaking authority' over employer-employee relations in the City of Greensboro rests only with the City Council and the City Manager." *Id.* at 965-66. Accordingly, the court held that even though the fire chief may have had final authority to determine whom to promote, he was not authorized to adopt a "municipal policy embodying anti-union animus." *Id.*; *see Crowley v. Prince George's County,* 890 F.2d 683, 685-86 (4th Cir. 1989) (holding that although a county police chief was responsible for personnel decisions within the police department, he did not have "final policymaking authority" that would impute liability to the county under 42 U.S.C. § 1981). Similarly, in this case, there is a total absence of any policymaking authority delegated to Chief Wells by the City's Code of Ordinances. Chief Wells's final decisionmaking authority regarding whether to order Delia to produce the rolls of insulation, standing alone, is insufficient to subject the City to liability for his action. Accordingly, we affirm the district court's grant of summary judgment in the City's favor.

IV. CONCLUSION

Upon *de novo* review, we hold that Delia's Fourth Amendment rights were violated when Chief Wells, Peel, and Bekker affected a warrantless "search" of Delia's home by ordering Delia to go into his home and bring out the rolls of insulation for inspection. Because Delia's actions were involuntary and occurred as a result of the direct threat of sanctions, we hold that the warrantless compelled search of Delia's home violated his rights under the Fourth Amendment. Nevertheless, we conclude that these defendants are entitled to qualified immunity because Delia has not established that this constitutional right was clearly established at the time of Chief Wells's order to Delia. We therefore affirm the district court's grant of summary judgment on their behalf. We further conclude that Filarsky is not entitled to qualified immunity as a private attorney. Thus, we reverse the district court's grant of summary judgment in his favor and remand for trial or further proceedings consistent with this opinion. Finally, we conclude that neither Chief Wells, nor any of the other individual defendants, had final policymaking authority for the City. Therefore, we affirm the district court's grant of summary judgment in favor of the City.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Each party is to bear its own costs on appeal.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NICHOLAS B. DELIA,

Plaintiff,

v.

CITY OF RIALTO, a Public Entity; CITY OF RIALTO FIRE DEPARTMENT, a Public Agency; STEPHEN C. WELLS, Individually and as the Fire Chief for the City of Rialto; MIKE PEEL Individually and as a Battalion Chief for the City of Rialto; FRANK BEKKER, Individually and as a Battalion Chief for the City of Rialto; STEVE A. FILARSKY, Individually and as Internal Affairs Investigator for the City of Rialto; and DOES 1 THROUGH 10 INCLUSIVE,

Defendants.

Case No.
CV 08-03359
R (PLAx)

JUDGMENT

(Filed Mar. 9, 2009)

JUDGMENT

This matter came on regularly for hearing on February 2, 2009, at 10:00 a.m. in Courtroom 8 of the above-entitled Court, the Honorable Judge Manuel L. Real presiding. Defendants and moving parties the City of Rialto, Stephen Wells, Mike Peel and Frank Bekker appeared by their attorneys of record Best Best & Krieger LLP by Howard B. Golds. Defendant Steve Filarsky appeared by his attorneys of record Gilbert, Kelly, Crowley & Jennett, LLP by Jon H. Tisdale. Plaintiff Nicholas B. Delia appeared by his attorneys of record Lackie, Dammeier & McGill by Sanjay Bansal.

The Court, having considered the Motion for Summary Judgment or Alternatively, Partial Summary Judgment brought by Defendants City of Rialto, Stephen Wells, Mike Peel and Frank Bekker and the Motion for Summary Judgment or Alternatively, Partial Summary Judgment brought by defendant Steve Filarsky, rules as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment in the above-captioned matter be, and hereby is, entered in favor of Defendants City of Rialto, Stephen Wells, Mike Peel, Frank Bekker and Steve Filarsky ("Defendants") and that plaintiff Nicholas Delia shall take nothing by way of his Complaint.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants shall recover their costs of suit herein.

Dated: March 9, 2009

/s/ Real
UNITED STATES
DISTRICT COURT JUDGE

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NICHOLAS B. DELIA,

Plaintiff,

v.

CITY OF RIALTO, a Public Entity; CITY OF RIALTO FIRE DEPARTMENT, a Public Agency; STEPHEN C. WELLS, Individually and as the Fire Chief for the City of Rialto; MIKE PEEL Individually and as a Battalion Chief for the City of Rialto; FRANK BEKKER, Individually and as a Battalion Chief for the City of Rialto; STEVE A. FILARSKY, Individually and as Internal Affairs Investigator for the City of Rialto; and DOES 1 THROUGH 10 INCLUSIVE,

Defendants.

Case No.
CV 08-03359
R (PLAx)

STATEMENT OF UNCONTROVERTED FACTS

(Filed Mar. 9, 2009)

The Motions for Summary Judgment or in the alternative Partial Summary Judgment ("Motions") of Defendants City of Rialto ("City"), Stephen C. Wells ("Wells"), Mike Peel ("Peel"), Frank Bekker ("Bekker") and Steve Filarsky ("Filarsky") came on regularly for hearing on February 2, 2009, in Courtroom 8 of the above-entitled Court, the Honorable Judge Manuel L. Real presiding. Defendants and moving parties the City of Rialto, Stephen Wells, Mike Peel and Frank Bekker appeared by their attorneys of record Best Best & Krieger LLP by Howard B. Golds. Defendant Steve Filarsky appeared by his attorneys of record Gilbert, Kelly, Crowley & Jennett, LLP by Jon H. Tisdale. Plaintiff Nicholas B. Delia ("Delia") appeared by his attorneys of record Lackie, Dammeier & McGill by Sanjay Bansal.

After consideration of the papers in support of and in opposition to the Motions for Summary Judgment or in the Alternative, Partial Summary Judgment and the argument of counsel, the Court determines that the following facts and conclusions of law have been established:

UNCONTROVERTED FACTS

1. Delia began his employment with the City's Fire Department in July 2000 as a "Fire Fighter," and was subsequently promoted to the rank of "Engineer." However, in February 2006, the City determined that grounds existed to discipline Delia and it proposed that he be demoted back to the rank of "Fire Fighter."

After a *Skelly* Hearing was held in May 2006, a final decision was made to demote Delia in June 2006. (Transcript of Deposition of Nicolas Delia taken on December 17, 2008 ("Delia Depo."), pp. 6:20-22; 72:4-9.)

2. In August 2006 while on duty, Delia was assisting in the control of a toxic spill when he began to feel ill. He was transported to the hospital and ultimately given an off-work order by a doctor for a period of three shifts. (Delia Depo,. pp. 12:8-13:5; 14:3-7.)

3. The City became suspicious of Delia's off-work status because of the circumstances involving his previous discipline, in that he was at the time appealing his demotion. The City thereupon hired a private investigation company to conduct surveillance of Delia while he was off work and during that investigation, Delia was filmed buying building supplies, including rolls of fiberglass building insulation, at a local Lowe's home improvement store. Based upon that evidence, the City decided to undertake a formal internal affairs investigation of Delia to determine whether he was off-work based upon false pretenses. In furtherance of the investigation, it was decided that Delia would be interviewed by Filarsky. (Declaration of Stephen C. Wells in Support of Motion for Summary Judgment ("Wells Decl."), ¶¶ 3, 4.)

4. At the time of the interview, Filarsky had for a number of years been regularly representing the City and providing legal advice to it regarding labor

and employment issues. As part of that work, Filarsky had previously questioned Fire Department employees in internal affairs investigations. (Wells Decl., ¶ 4.)

5. Filarsky's interview of Delia took place starting on September 18, 2006. In attendance were Filarsky, Peel, Bekker, Delia and Delia's legal counsel, Stuart Adams ("Adams"). The interview was tape recorded and subsequently transcribed ("Transcript"). (See Declaration of Michael Peel in Support of Motion for Summary Judgment ("Peel Decl."), Exhibit "A;" Peel Decl., ¶ 5; Delia Depo, pp. 41:17-42:8.)

6. Both Peel and Bekker were asked to attend the interview, although neither had any specific role in the interview other than to witness the events. (Peel Decl., ¶ 2; Declaration of Frank Bekker in Support of Motion for Summary Judgment ("Bekker Decl."), ¶ 2; Wells Decl., ¶ 5.)

7. Peel spoke once during the interview when he was asked at the very beginning by Filarsky to go through the formality of ordering Delia to answer the questions truthfully. Peel never spoke again and Bekker never spoke at all. (Transcript, p. 1:33-34; ; Peel Decl., ¶ 5; Bekker Decl., ¶ 5.)

8. The interview began at 10:02 a.m. and after some preliminary questioning, Filarsky began to question Delia about what had been purchased at Lowe's. Delia described some lumber and the building insulation and specifically stated that the insulation had not been installed and was sitting in his kitchen.

Filarsky subsequently showed Delia video tape taken of him making purchases at Lowe's, including his purchase of the fiberglass insulation. (Transcript, pp. 30:38-31:30; 23:17-24:38.)

9. At some point during the interview, Filarsky asked Delia to produce the insulation for inspection and informed Delia that if he was able to do so, he would be exonerated from the charges that were the basis for the internal affairs investigation. Adams advised Delia that he didn't need to produce the materials, Filarsky and Adams then got into a fairly heated dispute over whether an inspection would be allowed, and then at some point Adams threatened to sue both Peel and Bekker. (Peel Decl., ¶¶ 3, 4; Bekker Decl., ¶¶ 3, 4; Transcript, pp. 35:27-44:39.) During a break in the interview Filarsky consulted with Wells. Filarsky explained the situation involving the insulation and his desire to order Delia to produce the insulation. Wells did not understand or believe that having Delia show the insulation outside his house was a violation of Delia's rights and, in fact, Wells did not witness the arguments about this issue that occurred between Filarsky and Adams and which are reflected in the Transcript. Based on Filarsky's comments and advice, Wells issued the order and Filarsky to conveyed the order to Delia. (Wells Decl., ¶¶ 5, 6.)

11. Neither Peel nor Bekker participated in any discussions with Filarsky or Wells or anyone else about whether Delia should be ordered to show the building insulation, made the decision to issue the

order, or communicated the order to Delia. However, at the time Filarsky gave the order, both Peel and Bekker believed that the order was legal, both because Filarsky was a lawyer and because Delia was not being ordered to allow anybody to enter his house. (Peel Decl., ¶¶ 6, 7; Bekker Decl., ¶¶ 6, 7.)

12. After the break, the interview then recommenced and after more discussion with Adams and Delia's refusal to voluntarily produce the insulation, Filarsky ordered Delia to show the building insulation to the City. (Peel Decl., ¶ 4; Bekker Decl., ¶ 4; Transcript, pp. 34:24-35:25.)

13. After a lengthy break in the interview, the parties reconvened at which time Delia was presented with a written order to produce the insulation signed by Wells. Wells recalls being told by Filarsky that Delia's attorney had demanded that the order to show the insulation be put in writing, and believes that Filarsky drafted it and then asked Wells to sign it. (Wells Decl., ¶ 8 and Ex. "B;" Transcript, p. 54:14-15.)

14. After the interview was finished, Peel and Bekker followed Delia in a City vehicle to Delia's house where they waited a few minutes for Adams who had gotten lost on the way. When Adams arrived, Delia, Adams and a union representative went into Delia's house and brought out three or four rolls of fiberglass building insulation which he placed on his front lawn. Once finished, Peel thanked Delia and Peel and Bekker drove away. Filarsky was never

present at Delia's home. The entire process of putting the insulation on the lawn and having it observed by Peel and Bekker lasted about a minute. At no time did Peel and Bekker ever leave their City vehicle while they were parked at the curb in front of Delia's house and at no time did they enter Delia's house. Furthermore, the only thing removed by Delia from his house and shown to Peel and Bekker were the three or four rolls of fiberglass building insulation. (Peel Decl., ¶ 8; Bekker Decl., ¶ 8.)

CONCLUSIONS OF LAW

1. Peel, Bekker, Wells and Filarsky are protected from liability by the doctrine of qualified immunity as their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known because Delia has not demonstrated a violation of a clearly established constitutional right in that Delia was not threatened with insubordination or termination if he did not comply with any order given and none of these defendants entered plaintiffs house. *Pearson v. Callahan,* 555 U.S. ___, (January 21, 2009, No. 07-751), 172 L. Ed. 2d 565 (2009); *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982); *Mitchell v. Forsyth,* 472 U.S. 511, 525-27 (1985); *Saucier v. Katz,* 533 U.S. 194, 202 (2001); *Los Angeles Police Protective League v. Gates,* 907 F.2d 879, 887-888 (9th Cir. 1990).

2. Delia's claim against the City based on 42 U.S.C. section 1983 fails as a matter of law because

neither Wells, Peel, Bekker nor Filarksy had final policymaking authority, none was the policymaker for the City for the purposes of the act about which Delia complains and Delia has provided no evidence of any longstanding practice or custom of the City or that any official with final policy-making authority ratified the conduct of which Delia complains. *Cortez v. County of Los Angeles,* 294 F.3d 1186, 1189 (9th Cir. 2002); *Lytle v. Carl,* 382 F.3d 978, 982 (9th Cir. 2004); *Ulrich v. City and County of San Francisco,* 308 F.3d 968, 985; *Zografos v. City of San Francisco,* (Dec. 13, 2006, No. C 05-3881) N.D. Cal. [2006 Lexis 90101]; *Collins v. City of San Diego,* 841 F.2d 337 (9th Cir. 1988); *St. Louis v. Praprotinik,* 485 U.S. 112, 126 (1988); *Gillette v. Delmore,* 979 F.2d 1342 (9th Cir. 1992); Rialto Municipal Code sections 2.34.020, 2.34.030 and 2.34.040.

Dated: March 9, 2009

/s/ Real
UNITED STATES
DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES – GENERAL

CASE NO.: CV 08-3359-R **Date: FEB. 2, 2009**

TITLE: NICHOLAS B. DELIA V. CITY OF RIALTO, et al.

PRESENT:

HON. MANUEL L. REAL, JUDGE

Ricardo Juarez **Deputy Clerk**	**Bridget Montero** **Court Reporter**
ATTORNEY PRESENT FOR PLAINTIFF:	**ATTORNEYS PRESENT FOR DEFENDANTS:**
Sanjay Banal	**Howard Golds** **Jon Tisdale**

PROCEEDINGS: 1) Defendants City of Rialto et al's Motion for Summary Judgment; or, for partial summary judgment [33]

2) Defendant Filarsky's Motion for Summary Judgment [34]

Court GRANTS both motions for summary judgment [33, 34].

Counsel for defendants shall prepare the Statement of Uncontroverted Facts and the Judgments.

Plaintiff's Motion for Partial Summary Judgment [38] is hereby taken OFF calendar as MOOT.

5 min

Initials of Deputy Clerk RJ

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NICHOLAS B. DELIA, Plaintiff v. CITY OF RIALTO, A Public Entity; CITY OF RIALTO FIRE DEPARTMENT, A Public Agency; STEPHEN C. WELLS, Individually and as the Fire Chief for the City of Rialto; MIKE PEEL, Individually and as a Battalion Chief for the City of Rialto; FRANK BEKKER, Individually and as a Battalion Chief for the City of Rialto; STEVE A. FILARSKY, Individually and as an	)	Case No. CV 08-3359 R-PLAx Assigned to Hon. Manuel L. Real **DEFENDANT STEVE A. FILARSKY'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT; DECLARATION OF STEVE A. FILARSKY IN SUPPORT; DECLARATION OF JON H. TISDALE**

Internal Affairs Investigator for the City of Rialto; and DOES 1 THROUGH 10, INCLUSIVE, Defendants.	**IN SUPPORT; [PROPOSED] ORDER** **[Statement of Uncontroverted Facts and Conclusions of Law Filed Concurrently Herewith.]** **Date: February 2, 2009** **Time: 10:00 a.m.** **Courtroom: 217/8**

Please take notice that on February 2, 2009, at 10:00 a.m., or as soon thereafter as may be heard in Courtroom "217/8" of the above entitled court, located at 312 North Spring Street, Los Angeles, California 90012; Defendant STEVE A. FILARSKY (hereinafter referred to as "Defendant FILARSKY") will move this court for summary judgment pursuant to Federal Rules of Civil Procedure, Rule 56, as to Plaintiff's Complaint against Defendant FILARSKY.

This Motion will be made on the following grounds:

- In the instant action, Defendant FILARSKY, an attorney licensed in California, was retained by the City of Rialto to participate in an internal affairs investigation and provide legal advice in connection with personnel issues. As retained special counsel representing the City of Rialto in connection with internal personnel matters, Defendant FILARSKY may assert and is protected by *the doctrine of qualified immunity* to the same extent as any city official or other direct employee of the city.

- At the time Defendant FILARSKY was acting in his retained capacity of independent counsel for the City of Rialto, there was no obligation and/or duty imposed on Defendant FILARSKY to countermand the City's decision to order Plaintiff to produce specified building materials which plaintiff explained would exonerate him. Moreover, any reasonable attorney in Defendant FILARSKY's position would not have known that the request for Plaintiff to produce the specified building materials would conceivably constitute an unconstitutional "search" as alleged by plaintiff in view of the fact that the law was not clearly established that this action would constitute a violation of Plaintiff's constitutional rights under the 4th or 14th Amendments of the United States Constitution.

- Defendant FILARSKY is therefore entitled to summary judgment based upon the fact that he is entitled, as a matter of law, to assert the doctrine of qualified immunity, and that he is entitled, as a matter of law, to its full protection from any personal liability (and in fact from suit itself) for his alleged participation in what Plaintiff characterizes as an alleged unconstitutional "search".

- The threshold determination of whether the law governing the conduct at issue was clearly

> established is purely a question of law for the court. A determination, of reasonableness, although it may require consideration of factual issues, is appropriate for summary judgment if the facts are undisputed. Here, Defendant FILARSKY was sued in an individual capacity and as an Internal Affairs Investigator for the City of Rialto, along with co-defendants City of Rialto and its employees. Both the City of Rialto and its employees are entitled to assert the doctrine of qualified immunity for any personal liability for their actions taken "under color of state law". In addition, an attorney for the City is entitled to assert the doctrine of qualified immunity for any personal liability for actions taken "under color of state law". Clearly, Defendant FILARSKY was retained by the City of Rialto as a lawyer experienced in personnel and internal affairs matters, notwithstanding the rather odd differentiation offered by Plaintiff to suggest that FILARSKY played an individual role as opposed to his role as outside legal counsel on behalf of the City of Rialto. Accordingly, there is no genuine issue of material fact as to the capacity in which FILARSKY was acting and he is therefore entitled to summary judgment as a matter of law.

This Motion is based upon this Notice, the Memorandum of Points and Authorities in support thereof, the concurrently filed Declarations of Steve A. Filarsky and Jon H. Tisdale, the Exhibits attached thereto, the records and pleadings on file herein, and upon all such other oral and documentary evidence as may be presented at the time of the hearing.

Dated: January 12th, 2009

GILBERT, KELLY, CROWLEY &
JENNETT, LLP

By: /s/ Jennifer West
JOHN H. TISDALE
JENNIFER WEST
Attorneys for Defendant
STEVE A. FILARSKY

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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS/SUMMARY OF THE ARGUMENT.

This is an action by plaintiff NICHOLAS B. DELIA (hereinafter "Plaintiff") for the alleged violation of his civil rights. The Complaint alleges that in or about September 2006, Plaintiff was compelled under threat of insubordination and termination, to go to his home and produce certain private property for examination to "Defendants."[1] The Complaint further alleges that Defendants FILARSKY, Peel, Bekker, and Wells gave the unlawful order for said search and, as such, violated Plaintiff's constitutional rights.[2]

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[1] See, Complaint, ¶9, attached hereto as Exhibit "A".

[2] See, Complaint, ¶9, attached hereto as Exhibit "A".

The crux of Plaintiff's contention is that Defendant Steve A. Filarsky ("FILARSKY") performed services at the behest of the City of Rialto, a public municipality organized under the laws of the State of California[3] (hereinafter referred to as "City"). City retained FILARSKY solely to participate in internal affairs investigations with respect to City employees. It is alleged that in doing the acts alleged herein, Defendant FILARSKY acted under color of state law, within the course and scope of employment, and as an official policy-maker of the City."[4] The Complaint further prays for general, special, and exemplary damages for civil rights violations along with attorney's fees and costs.[5]

On September 18, 2006, an interview of Plaintiff was conducted in connection with an internal investigation; the subject matter of the investigation was the suspected inappropriate use of "sick time" by DELIA to work on a home remodeling project.[6] Battalion Chiefs Mike Peel and Frank Bekker, Plaintiff's attorney Stuart Adams, and Defendant FILARSKY were present (hereinafter collectively referred to as

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[3] See, Complaint, ¶4, attached hereto as Exhibit "A".

[4] See, Complaint ¶5, attached hereto as Exhibit "A".

[5] See, Complaint¶¶15, 16 attached hereto as Exhibit "A".

[6] See, Declaration of Defendant FILARSKY, ¶6; see also Deposition of Plaintiff p.24, lns. 2-6, attached to the Declaration of Jon H. Tisdale as Exhibit "B".

"Battalion Chiefs").[7] Fire Chief Stephen Wells was nearby in the same building and available, although not present in the room for the interview.[8] On behalf of City, Defendant FILARSKY was investigating Plaintiff based upon a *sub rosa* videotape which showed him purchasing building materials and unloading them at his home on a "sick" day.[9] Defendant FILARSKY was retained as outside legal counsel by the City because he was a lawyer and because he was experienced in personnel and internal affairs matters.[10] Defendant FILARSKY has conducted numerous investigations on behalf of the City, and has always been expected to conduct not only the investigations and interviews, but provide legal analysis, propose alternative disciplinary actions, draft correspondence regarding disciplinary actions directed by City employees, and conduct or participate in legal proceedings/hearings.[11] As such, Mr. Filarsky would not have been retained by the City to perform legal services had he not been a licensed attorney.

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[7] See, Declaration of Defendant FILARSKY, ¶7; see also Deposition of Plaintiff p.27. lns. 7-18, attached to the Declaration of Jon H. Tisdale as Exhibit "B".

[8] See, Declaration of Defendant FILARSKY ¶7.

[9] See, Declaration of Defendant FILARSKY, ¶6; see also Deposition of Plaintiff, p. 29, lns. 11-22, attached to declaration of Jon H. Tisdale as Exhibit "B".

[10] See, Declaration of Defendant FILARSKY, ¶5.

[11] See, Declaration of Defendant FILARSKY, ¶4.

The City had videotaped Plaintiff purchasing and loading plywood, lumber and rolls of fiberglass insulation at Lowe's Home Improvement Center (hereinafter referred to as the "Subject Building Materials").[12] At the interview of September 18, 2006, Plaintiff indicated *in his defense* that he did not incorporate the Subject Building Materials into his home remodeling project and that the Subject Building Materials remained unused at his residence.[13]

At the commencement of the interview, FILARSKY had no way of knowing in advance what explanation DELIA might offer in his defense of what was depicted in the videotape. Certainly, going into the interview, no one could reasonably have foreseen that DELIA would ***offer in his own defense*** an explanation that could so easily be corroborated by nothing more than simply showing the Subject Building Materials to his superiors.[14] During the investigation it became apparent from Plaintiff's responses that the Subject Building Materials were still in Plaintiff's kitchen and had not been incorporated into the walls.[15] At that point, there was a break in the

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[12] See, Declaration of Defendant FILARSKY, ¶6.

[13] See, Declaration of Defendant FILARSKY, ¶9; see also, written transcript of recording of Plaintiff's interview, attached thereto as Exhibit "A" to FILARSKY Declaration, pgs. 23-24, lns. 24-47; 1-5.

[14] See, Declaration of Defendant FILARSKY, ¶8.

[15] See, Declaration of Defendant FILARSKY, ¶9; see also, written transcript of recording of Plaintiff's interview, attached

(Continued on following page)

interview.[16] It was then suggested that if Plaintiff would simply show the Battalion Chiefs the Subject Building Materials, the investigation would be over and it would be resolved in DELIA's favor with no disciplinary action.[17]

The interview was then resumed and, at the direction of Chief Wells, it was requested that Plaintiff go home and produce the Subject Building Materials for his superiors in order to dispel questions relating to the allegation of misused sick leave.[18] Prior to issuing any order to produce the Subject Building Materials, Defendant FILARSKY communicated separately with Defendants Wells, Bekker, and Peel.[19] At that point in time, it was decided by Chief Wells to ask Plaintiff DELIA's permission for his superiors to simply view the Subject Building Materials to verify that they were still at Plaintiff's residence, not yet incorporated into the walls.[20] Plaintiff was represented by attorney Stuart Adams; when DELIA was requested to show the building materials to his superiors, Adams advised DELIA to refuse to produce the build-

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thereto as Exhibit "A" to FILARSKY Declaration, pgs. 23-24, lns. 24-47; 1-5.

[16] See, Declaration of Defendant FILARSKY, ¶10.

[17] See, Declaration of Defendant FILARSKY, ¶11; see also, Deposition of Plaintiff, p. 52, lns. 3-9, attached hereto as Exhibit "B".

[18] See, Declaration of Defendant FILARSKY ¶11.

[19] See, Declaration of Defendant FILARSKY ¶10.

[20] See, Declaration of Defendant FILARSKY ¶11.

ing materials.[21] Based on advice of counsel by Mr. Adams, Plaintiff denied the request.[22] The request was then clarified in the interview by FILARSKY, who indicated that the City had no intention of going *inside* Plaintiff's home at all but rather wanted Plaintiff to simply bring out the Subject Building Materials to the front yard for visual verification.[23] Again, Adams advised DELIA not to do so, even though it was expressly represented that the production of the Subject Building Materials would completely exonerate DELIA and end the investigation.[24]

After another discussion off the record, Defendant Wells, as the current Fire Chief, converted the request to produce the Subject Building Materials into a written order.[25] Defendant Wells had the final authority to unilaterally order the production of Subject Building Materials.[26] Defendant FILARSKY had no authority to make such an order, unilaterally or otherwise.[27] At no point in time before and/or after the order was issued was Plaintiff ever threatened to produce the Subject Building Materials under threat of insubordination and/or termination.[28] Defendant Wells signed the final written order, which required the production of the Subject Building Materials.[29] Notwithstanding Mr. Adams advice to Plaintiff, he voluntarily produced the Subject Building Materials to the Battalion Chiefs after the order was issued.[30] No one from the City or on behalf of the City ever entered Plaintiff's residence (or even set foot on his property).[31] In fact, the only city employees present at DELIA's home during the so called "search" were Peel and Bekker and *neither man ever got out of the car.*[32]

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[21] See, Declaration of Defendant FILARSKY, ¶12; see also, copy of written transcript of recording of Plaintiff's Interview attached thereto as Exhibit "A", pg. 34. lns. 10-19.

[22] See, Declaration of Defendant FILARSKY, ¶13.

[23] See, Declaration of Defendant FILARSKY, ¶14.

[24] See, Declaration of Defendant FILARSKY, ¶14.

[25] See, Declaration of Defendant FILARSKY, ¶15; see also, Plaintiff's Deposition pgs. 45-46, lns. 21-25; 1-3, attached as Exhibit "B" to Declaration of Jon H. Tisdale.

[26] See, Declaration of Defendant FILARSKY, ¶16.

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[27] See, Declaration of Defendant FILARSKY, ¶17; see also, copy of written transcript of Plaintiff's Subject Investigation attached thereto as Exhibit "A", pg. 39, lns. 36-48.

[28] See, Declaration of Defendant FILARSKY, ¶18; see also, copy of written transcript of Plaintiff's Subject Investigation attached thereto as Exhibit "A", and Deposition of Plaintiff, p. 51, lns. 2-24, attached to Declaration of Jon H. Tisdale as Exhibit "B".

[29] See, Declaration of Defendant FILARSKY, ¶15; see also, Exhibit "D" attached to Declaration of Jon H. Tisdale, Written Order dated September 18, 2006, sent to Plaintiff by Defendant Wells; and Plaintiff's Deposition, pgs. 45-46; lns. 21-25; 1-3, attached to Declaration of Jon H. Tisdale as Exhibit "B".

[30] See, Declaration of Defendant FILARSKY, ¶21.

[31] See, Declaration of Defendant FILARSKY, ¶21.

[32] See, Plaintiff's Deposition p. 58, lns. 4-17, attached to Declaration of Jon H. Tisdale as Exhibit "B".

Prior to issuing the order to produce the Subject Building Materials, *no less than four* union representatives were called and summoned by Plaintiff's counsel, Stuart Adams, to the interview to sit in and listen while Plaintiff was ordered to drive to his home, remove the Subject Building Materials from inside, and show them to the Battalion Chiefs without objection.[33] Moreover, Defendant FILARSKY spoke to then City Attorney, Bob Owen, on the telephone prior to issuing the order.[34] Defendant FILARSKY advised Mr. Owen of the circumstances surrounding the investigation and the proposed order.[35] Further, Mr. Adams called and spoke to Mr. Owen prior to the order being issued.[36] Mr. Owen posed no objection and Defendant FILARSKY was advised to go forward with the order.[37] Lastly, Defendant FILARSKY ***did not even personally attend the alleged search***.[38]

Specifically at issue is the applicability of the doctrine of qualified immunity protecting Defendant

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[33] See, Declaration of Defendant FILARSKY, ¶19; Plaintiff's Deposition pgs. 27 and 48, lns. 7-18 and 10-19, attached to Declaration of Jon H. Tisdale as Exhibit "B".

[34] See, Declaration of Defendant FILARSKY, ¶20.

[35] See, Declaration of Defendant FILARSKY, ¶20.

[36] See, Plaintiff's Deposition pgs. 43-44, lns. 21-25; 1-2, attached to Declaration of Jon H. Tisdale as Exhibit "B".

[37] See, Declaration of Defendant FILARSKY, ¶20.

[38] See, Declaration of Defendant FILARSKY, ¶21; see also Plaintiff's Deposition p. 47, lns. 13-14, attached to Declaration of Jon H. Tisdale as Exhibit "B".

FILARSKY for his advisory role in providing legal advice to the City relating to the alleged search of the Subject Building Materials belonging to Plaintiff.

By this Motion, Defendant FILARSKY moves for Summary Judgment on Plaintiffs Complaint and submits that while he was not a regular employee of the City, Defendant FILARSKY was retained by the City as an attorney and asked to assist in providing legal advice in connection with personnel issues. As retained outside counsel, Defendant FILARSKY may therefore assert the doctrine of qualified immunity to the same extent as any city official. Moreover, Plaintiff specifically contends that Defendant FILARSKY "acted under color of state law", within the course and scope of his position with the City as "outside counsel", and as an official of the City. By this Motion, Defendant FILARSKY further submits that because he is entitled to the application and full protection of the doctrine of qualified immunity, the remaining individual capacity claims made against him must be dismissed. Accordingly, there is no genuine issue of material fact for such alleged actions, and Defendant FILARSKY is entitled to summary judgment as a matter of law.

II. SUMMARY OF THE ARGUMENT

The individual capacity claims against Defendant FILARSKY must be resolved by summary judgment because Defendant FILARSKY is entitled to qualified immunity. Government officials performing discretionary functions are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory rights of which a reasonable person would have known." (*Harlow v. Fitzgerald* (1992) 457 U.S. 800, 818. Qualified immunity is not merely immunity to liability, but immunity from suit itself. (See, *Babb v. Dorman*, (5th Cir. 1994), 33 F.3d 472, 477.)

In the instant action, Defendant FILARSKY is not an employee of the City per se; however, he was clearly retained by the City in his capacity as an attorney and specifically requested to assist it in providing legal advice for personnel issues. Defendant FILARSKY has conducted numerous investigations on behalf of the City for the past fourteen years, and has always been expected to conduct and direct not only the investigative portion, but also provide legal analysis, propose alternative disciplinary actions, draft correspondence regarding the proposed disciplinary actions, and conduct or participate in legal proceedings/hearings.[39] As retained counsel, Defendant FILARSKY is therefore entitled to the blanket of protection under the doctrine of qualified immunity to the same extent any city official would be. (*Cullinan v. Abramson* (6th Cir. 1997) 128 F.3d 301, 310, cert. denied, 140 L.Ed. 2d. 792, 523 U.S. 1094 (1998), holding that the rationales, for qualified immunity

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[39] See, Declaration of Defendant FILARSKY, ¶¶3 and 4.

unity apply to [private] lawyers and their firms in about the same way they apply to [the government attorney].")

By the language of the standing case law and the uncontroverted facts of this case, there is no question that Defendant FILARSKY is entitled to protection under the doctrine of qualified immunity thereby properly resolving the individual capacity claims against him by summary judgment.

III. SUMMARY JUDGMENT IS PROCEDURALLY PROPER.

This Motion is brought pursuant to Rule 56 of the Federal Rules of Civil Procedure on the grounds that there are no genuine issues as to any material facts, and that as a matter of law there is no potential for liability as to individual capacity claims pursuant to the applicable doctrine of qualified immunity. Accordingly, Defendant FILARSKY is entitled to summary judgment.

Summary Judgment is appropriate when a party is unable to show a genuine, triable issue of material fact on which the party will bear the burden of proof at trial, so long as judgment against that party is appropriate as a matter of law. (*Celotex Corp. v. Catrett* (1986) 477 U.S. 317, 322; *Department of Commerce v. U.S. House of Representatives* (1999) 525 U.S. 316, 327. Material facts are those necessary to the proof or defense of a claim, and are determined by reference to the substantive law. (See *Anderson v.*

Liberty Lobby (1986) 477 U.S. 242, 248. Summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." (*Celotex*, 477 U.S. at 322-23.) Moreover, "[a] summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data." (*Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

There is question of law for the court to determine as to whether the "outside counsel" status of Defendant FILARSKY makes him eligible for the application of the doctrine of qualified immunity. In *Saucier v. Katz* (2001) 533 U.S. 194, 201, the Supreme Court set out a two step inquiry in determining whether an official has qualified immunity. First, taken in the light most favorable to the party asserting the injury, do the facts show the officers conduct violated a Constitutional right? (*Id.*) Second, the court must ask whether the right was clearly established. (*Id.*) The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable [actor] his conduct was unlawful in the situation he confronted. (*Id.*; see also *Phillips v. Hust* (9th Cir. 2007) 477 F.3d 1070, 1079. In the Ninth Circuit, this two-part test determines the scope of qualified immunity for governmental officials. (*Phillips v. Hust* (9th Cir. 2007) 477 F.3d 1070, 1079.) First, the court must determine whether the law governing the officials' conduct was clearly established at the time the officials acted. If the law was clearly established, the official is entitled to immunity from suit. (See, *Somers v. Thurman* (9th Cir. 1997) 109 F.3d 614, 616-17, cert. denied, 510 U.S. 893 (1997); *Act UP!/Portland v. Bailey* (9th Cir. 1993) 988 F.2d 868, 871.) If the law was *not* clearly established, the court must determine whether reasonable officials would have believed that their actions were lawful. If the court so finds, the officials are entitled to qualified immunity. (See, *Somers v. Thurman*, (9th Cir. 1997) 109 F.3d 614, 616-17, cert. denied, 510 U.S. 893 (1997); *Act UP!/Portland v. Bailey* (9th Cir. 1993) 988 F.2d 868, 871.)

For a federal right to be clearly established at the time of the defendant's alleged conduct, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. (See, *Somers v. Thurman*, (9th Cir. 1997) 109 F.3d 614, 616-17, cert. denied, 510 U.S. 893 (1997); *Act UP!/Portland v. Bailey* (9th Cir. 1993) 988 F.2d 868, 871.) This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law that unlawfulness must be apparent. (*Anderson v. Creighton* (1987) 483 U.S. 635, 640 (citations omitted). The threshold determination of whether the law governing the conduct at issue is clearly established is a question of law for the court. (See, *Harlow v. Fitzgerald* (1992) 457 U.S. 800, 818.) Plaintiff bears the burden of showing that the constitutional right at issue was clearly established at the time of defendants' conduct (See, *Baker v. Racansky* (9th Cir. 1989) 887 F.2d 183, 186.) A determination of reasonableness, although it may require consideration of factual issues, is appropriate for summary judgment if the facts are undisputed. (See, *Act UP!/ Portland v. Bagley* (9th Cir. 1993) 988 F.2d 868, 872.)

In determining whether to grant summary judgment, once a party has established that summary judgment is appropriate, i.e., by illustrating for the court an absence of evidence in support of alleged claims or defenses, the burden then shifts to the opposing party to demonstrate that a genuine issue of material fact remains. (*Federal Rules of Civil Procedure*, Rule 56(e), and *Celotex Corp. v. Catrett*, *supra*, at 317.) Here, Plaintiff filed a Complaint for violation of his civil rights based on 42 U.S.C. §1983, which states:

> Every person who, ***under color of any statute***, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the ***deprivation of any rights, privileges, or immunities secured by the constitution and laws***, shall be liable to the party injured in an action at law, suit in equity, or

> other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(Emphasis Added.)

To state a claim or cause of action for violation of civil liberties under 42 U.S.C. §1983 a plaintiff must prove two elements: (1) that the defendant deprived him of a right secured by the "Constitution and laws" of the United States, and (2) that the defendant deprived him of his constitutional right "under color of any statute, ordinance, regulation, custom or usage, of any State or Territory"; this second element requires the plaintiff to show that the defendant acted "under color of law." (*Doe v. Detroit Board of Education* (2004, E.D. Mich.) 310 F.Supp.2d. 871; *Vives v. Rey* (2004, DC Puerto Rico) 310 F.Supp.2d. 404; *American Mfrs. Mutual Ins. v. Sullivan* (1999) 526 U.S. 40; see also, *Adickes v. S.H. Kress & Co.* (1970) 398 U.S. 144.) Defendant FILARSKY conducted Plaintiffs internal investigation and interview in the capacity as outside counsel for the City at its behest. Defendant FILARSKY conducted this interview in compliance with state law, in which the Fire Chief Battalion Chiefs, the City Attorney, and union representatives, along with the consent of Plaintiff resulted in an order to bring out the Subject Building Materials from Plaintiff's home. As such, a reasonable attorney in Defendant FILARSKY'S situation would not have known that this action: (1) constituted a search at all, and (2) clearly violated Plaintiff's constitutional rights under the 4th and 14th Amendments. Thus, the application of the doctrine of qualified immunity is applicable to Defendant FILARSKY for which resolution by this motion for summary judgment is not only proper but necessary.

IV. QUALIFIED IMMUNITY IS CATAGORICALLY AVAILABLE TO DEFENDANT FILARSKY.

The doctrine of "qualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions." (*Wyatt v. Cole* (1992) 504 U.S. 158, 167, (citing *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 819.) Among the important rationales advanced for qualified immunity are the preservation of the government's ability to serve the public good by zealous enforcement of the law and the avoidance of deterring talented candidates from entering government employment for fear of liability. (*Id.*)

As a preliminary matter, while it is undisputed that there was "state action" on the part of Defendant FILARSKY, this fact alone does not require this court to find that he is entitled to qualified immunity. (See, *Richardson v. McKnight* (1997) 521 U.S. 399, 138

L. Ed. 2d 540; *Wyatt* 504 U.S. at 168.) There are two questions that must be answered with respect to Defendant FILARSKY'S claim of qualified immunity. First, the court must determine whether qualified immunity is categorically available. This requires an evaluation of the appropriateness of qualified immunity given its historical availability and the policy considerations underpinning the doctrine. (See, *Richardson, supra*, 521 U.S. at 399.)

We first address the categorical availability of qualified immunity. The Supreme Court in *Richardson* analyzed the availability of qualified immunity by looking to history and policy. Although § 1983 "'creates a species of tort liability that on its face admits of no immunities,'" (*Wyatt, supra*, 504 U.S. at 163 (quoting *Imbler v. Pachtman*, 424 (1976) U.S. 409, 417), the Court nonetheless accords qualified immunity where a "tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.'" (504 U.S. at 164 (quoting *Owen v. City of Independence*, 445 U.S. 622, 637, (1980) (quoting *Pierson v. Ray*, 386 U.S. 547, 555, (1967).)

In *Richardson*, the Court held that qualified immunity was not available to privately employed prison guards because the Court was unable to identify a "firmly rooted" tradition of such immunity. (521 U.S. at 404.) Although government-employed prison guards had enjoyed qualified immunity growing out of their employment status, the Court cited extensive history of private institutions involved in providing prison services and cases allowing the imposition of liability on private jailors. The Court therefore concluded that no firmly rooted tradition of immunity existed. (See, *Id.* at 404-07.) *However, the Court left open the question whether some private actors closely related to governmental function might have some kind of qualified immunity in contexts unrelated to prisons.*

Limited information has been presented on the historical availability of immunity for private lawyers asked by the government to make decisions on their behalf involving 42 U.S.C. §1983 claims. However, the Supreme Court in *Richardson* stated that "apparently the law did provide a kind of immunity for certain private defendants, such as doctors or *lawyers* who performed services at the behest of the sovereign." (*Id.* at 407 (citing *Tower v. Glover*, (1984) 467 U.S. 914, 921, and J. Bishop, Commentaries on Non-Contract Law §§ 704, 710 (1889)). (Emphasis Added.) While the extent or "kind" of immunity was not discussed in *Richardson*, the United States Court of Appeals in the 6th Circuit has been confronted with the same legal question as to whether the "outside counsel" status of private lawyers and their firms makes these defendants eligible for qualified immunity. (See, *Cullinan v. Abramson* (6th Cir. 1997) 128 F.3d 301, 310, cert. denied, 140 L.Ed. 2d. 792, 523 U.S. 1094, (1998).

In *Cullinan*, *supra*, Plaintiffs were independent investment managers who handled a portion of the assets of a Louisville, Kentucky police fund that brought a federal civil rights/RICO lawsuit, now codified under 42 U.S.C. §1983, against the city, its outside lawyers, the mayor, and other city officials, all of whom were said to have been involved in the efforts to have the plaintiffs fired as investment managers for the pension fund. (*Id.*) All defendants moved for dismissal of the complaint under Federal Rules of Civil Procedure, Rule 12, asserting among other defenses, absolute and qualified immunity from suit on both the federal claims and numerous pendent state law claims by which the federal claims were accompanied. (*Id.*)

The district court largely denied the motions to dismiss, and each of the defendants except the city and their outside counsel perfected an interlocutory appeal from the denial of immunity. The appellate court, however, concluded that as attorneys for the city, the city's outside counsel, were clearly acting as the city's agents. (*Cullinan*, *supra* at pg. 310.) Citing *Richardson*, the court determined that the rationales for qualified immunity applied to these lawyers and their firm in the same way they applied to the city's sometime law director, who was also a named defendant (*Id.*)

As was the case in *Cullinan*, here we are dealing with a defendant who was retained to represent the City in its investigation of Plaintiff. Defendant FILARSKY would not have been involved in Plaintiff's investigation on an individual basis had it not been at the specific request of the City. Defendant

FILARSKY has conducted numerous investigations on behalf of the City for the past fourteen years, and has always been expected to conduct not only the investigation portion, but also provide legal analysis, propose alternative disciplinary actions, draft correspondence regarding the proposed disciplinary actions, and conduct or participate in legal proceedings/hearings.[40] Moreover, Defendant FILARSKY would not have been retained by the City as its outside counsel but for the fact that he was a licensed attorney with vast experience in dealing with employment/personnel issues. According, Defendant FILARSKY is therefore eligible for the application of the doctrine of qualified immunity pursuant to his status as retained outside counsel for the City.

V. PLAINTIFF HAS NOT FOR PURPOSES OF SUMMARY JUDGMENT DEMONSTRATED THAT HE WAS DEPRIVED OF A CONSTITUTIONAL RIGHT UNDER THE FOURTH OR FOURTEENTH AMENDMENTS BY DEFENDANT FILARSKY.

a. Fourth Amendment:

Plaintiff contends that on September 18, 2006, he was compelled under threat of insubordination and termination, to go to his home and produce certain private property for examination to "Defendants", which in and of itself resulted in a violation of his

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[40] See, Declaration of Defendant FILARSKY ¶4.

Fourth and Fourteenth Amendment protections against unreasonable search and seizures.[41] However, Plaintiff has not described and/or produced any evidence or case law, which would explain how either the Fourth or Fourteenth Amendment to United States Constitution protects him from being asked to show his superiors a few rolls of insulation under circumstances where *he himself offered up the status of the Subject Building Materials in defense of the internal affairs charges against him.*

We start with the principle that the Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures, just as it prohibits the issuance of a warrant without probable cause. Nowhere is the protective force of the fourth amendment more powerful than it is when the sanctity of the home is involved. (*United States v. Shaibu* (9th Cir. 1990) 895 F.2d 1291, No. 88-5367, slip op. 1659, 1664-65; *United States v. Winso*r (9th Cir. 1988) 846 F.2d 1569, (en banc). However, Plaintiff has never put forth any evidence or case law in support of his contention that Defendant FILARSKY'S conduct in conducting the internal investigation and concurring with the order constituted a "search" which was in violation of his Fourth Amendment rights.

The order indicated that the City did not issue any order to go inside Plaintiff's home at all but rather that Plaintiff simply bring certain building materials offered up as his explanation in support of his defense outside the home to the front yard for visual confirmation.[42] It should be noted that Plaintiff voluntarily produced the Subject Building Materials in his front yard.[43] At no point in time prior to and/or after the order was given was Plaintiff ever compelled under threat of insubordination and termination to produce the Subject Building Materials.[44] Lastly, Defendant FILARSKY consulted with City Attorney, Bob Owen, the Fire Chief, as well as the Battalion Chiefs and left it up to their discretion to make the order to produce the Subject Building Materials. *None of these individuals objected.*[45] Defendant FILARSKY did not have the authority to issue such an order and certainly did not have the authority to carry it out. In fact, Defendant FILARSKY was not even present at the alleged search, which took place after the recorded investigation was over.[46] As such, on the evidence provided, viewed in the light most favorable to the Plaintiff, it is impossible to conclude that an intrusion upon plaintiff's constitutional rights even occurred. Plaintiff's allegations are conclusory at best. Accordingly, Plaintiff has failed to prove that his allegations are sufficient to support the contention that a "search" occurred or that it constituted a deprivation of his constitutional rights under the 4th Amendment.

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[41] See, Complaint ¶12, attached hereto as Exhibit "A".

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[42] See, Declaration of Defendant FILARSKY, ¶14.

[43] See, Declaration of Defendant FILARSKY, ¶21.

[44] See, Declaration of Defendant FILARSKY ¶18; see also, Deposition of Plaintiff p.51, lns. 2-24, attached to Declaration of Jon H. Tisdale as Exhibit "B".

[45] See, Declaration of FILARSKY ¶10, 16, 19, and 20; see also, Deposition of Plaintiff, p.48, lns 10-19, attached to Declaration of Jon H. Tisdale as Exhibit "B".

[46] See, Declaration of Defendant FILARSKY, ¶21.

b. Fourteenth Amendment:

While Plaintiff has alleged that his Fourteenth Amendment protections against unreasonable searches and seizures have been violated – specifically, denial of equal protection – Plaintiff has wholly failed to provide any evidence or case law in support of his contention that the alleged "search" constituted a denial of equal protection.

As argued above, the order indicated that the City did not ask or order to go inside Plaintiff's home at all but rather that Plaintiff go home and bring the Subject Building Materials outside to the front yard for visual confirmation.[47] Moreover, Plaintiff voluntarily consented to the Chief Battalions following him home and in fact, produced the Subject Building Materials in his front yard.[48] At no point in time prior to and/or after the order was given was Plaintiff ever compelled under threat of insubordination and termination to produce the Subject Building

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[47] See, Declaration of Defendant FILARSKY, ¶14

[48] See, Declaration of Defendant FILARSKY, ¶21.

Materials.[49] Lastly, Defendant FILARSKY consulted with City Attorney, Bob Owen, the Fire Chief, as well as the Battalion Chiefs and left it up to their discretion to make the order to order the production of the Subject Building Materials. *None of these individuals objected.*[50] As such, it is impossible to conclude that a constitutional violation of Plaintiff's 14th Amendment Equal Protection rights occurred. Accordingly, Plaintiff has failed to prove that his allegations are sufficient to establish a "search", which would constitute a deprivation of his constitutional rights under the 4th Amendment or a denial of equal protection under the Fourteenth Amendment.

VI. IT WOULD NOT HAVE BEEN CLEAR TO ANY REASONABLE ATTORNEY THAT DEFENDANT FILARSKY'S CONDUCT. WAS UNLAWFUL IN THE SITUATION HE CONFRONTED.

The second inquiry is whether the constitutional right was clearly established. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable [actor] his conduct was unlawful in the situation he confronted." (*Phillips v. Hust* (9th Cir. 2007) 477 F.3d 1070, 1079 (emphasis added). In the case of *Milan v. Sailer* (9th Cir. 2007) 2007 U.S. Dist LEXIS 41111[51], the court concluded that because Plaintiff failed to provide any evidence or authority for her claim that a reasonable actor would know that it was a violation to preside over a hearing held in compliance with state law, in which the Committee members voted to uphold an earlier actor's suspension, Plaintiff's claims were dismissed. Plaintiff argued that the Chair of the Disciplinary Committee, Defendant Pearson, was obligated to dissent, or to inform the Committee that it was violating plaintiff's constitutional rights. However, Plaintiff's lack of citation to supporting case law supporting her position that a reasonable actor in Defendant Pearson's situation would have known that failing to do so violated a clearly established constitutional right allowed (actually mandated) the Court to conclude that Defendant Pearson was entitled to be Qualifiedly Immune from plaintiff's §1983 claims against him. (*Milan*, 2007 U.S. Dist. LEXIS 41111, 18.) Accordingly, Defendant Pearson's Motion for Summary Judgment was granted.

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[49] See, Declaration of Defendant FILARSKY, ¶18; see also, Deposition of Plaintiff, p.51, lns. 2-24, attached to Declaration of Jon H. Tisdale as Exhibit "B".

[50] See, Declaration of FILARSKY ¶10, 16, 19, and 20; see also, Deposition of Plaintiff p.48, lns 10-19, attached to Declaration of Jon H. Tisdale as Exhibit "B".

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[51] Plaintiff was a former student at Bates Technical College. In March 2006, Defendant Sailer, the school's Vice President of Student Services suspended Plaintiff after she filed a student grievance against a nursing instructor. Plaintiff appealed, and the suspension was upheld by the Bates Technical College Student/Facility Disciplinary Committee. She appealed again and the suspension was ultimately upheld by the school's President. In her Complaint, Plaintiff alleged she was denied her First Amendment and Due Process rights, and asserted a claim under 42 U.S.C. 1983. The defendants, were Seiler, Bates President David Borofsky, and the Chair of the Student/Faculty Disciplinary Committee, John Pearson. Defendant Pearson moved to dismiss all claims against him, on the basis of Absolute and Qualified Immunity, and on the ground that Plaintiff could not establish that he deprived her of any constitutional right.

Here, we have a virtually identical factual case where Defendant FILARSKY was presiding over the investigative hearing and did not otherwise have any authority to order Plaintiff to produce the Subject Building Materials and/or enforce such an order. Moreover, it was the City that ultimately collectively decided that if Plaintiff would show them the Subject Building Materials, the investigation would be over. The City asked for permission but was denied; City then decided to order the production of the Subject Building Materials with no credible reason whatsoever to believe that they were doing anything wrong. No less than four union representatives were called to the interview to sit in and listen while Plaintiff was ordered to drive to his house, remove the Subject Building Materials from inside and show them to the Battalion Chiefs, all of which occurred without objection after the interview was concluded. Further, Defendant FILARSKY spoke to the City Attorney, Bob Owen, before going back into the interview and discussed the proposed order with him; the ***actual*** City Attorney had no objection.

As such, Plaintiff has thus far provided no evidence and no authority in support of his claim that a reasonable actor in Defendant FILARSKY'S position would have or should have known that it was a violation to preside over a hearing held in compliance with state law and to advise that he knew of no legal reason why the City could not issue an order to DELIA to bring out the Subject Building Materials from Plaintiff's home. Accordingly, no reasonable attorney would have any reason to know that this conduct would violate Plaintiff's constitutional rights under the 4th and/or 14th Amendments to the Constitution.

Moreover, there is a *complete omission* of reference to any case law, much less Supreme Court case law, which would satisfy plaintiff's burden of proof that a reasonable actor in Defendant FILARSKY'S situation would have known that failing to specifically object to the alleged search violated a clearly established constitutional right. Notwithstanding this complete lack of legal support, there is no obligation and/or duty, which was created that would obligate Defendant FILARSKY to countermand the proposed order. For these reasons, the Court must conclude, as it did in *Milan*, that Defendant FILARSKY is entitled to be Qualifiedly Immune from Plaintiff's §1983 claims against him.

VII. DEFENDANT FILARSKY IS ENTITLED TO QUALIFIED IMMUNITY IN THIS CASE AS THE ALLEGED SERACH WAS VOLUNTARILY CONSENTED TO BY THE PLAINTIFF.

It is clearly established that defendants are not entitled to enforce unconstitutional statutes so as to deprive plaintiffs of their rights. It is not at all clear, however, that a reasonable attorney would have known that advising the City to request the voluntarily inspection of Plaintiff's Subject Building Materials was unconstitutional and a violation of his privacy. Moreover, it is even more unclear that a reasonable attorney would have known that failing to specifically object to the alleged search on behalf of Plaintiff violated a clearly established constitutional right.

It is said that "consent" is a "waiver" of a person's rights under the Fourth and Fourteenth Amendments. The argument is that by allowing the police to conduct a search, a person "waives" whatever right he had to prevent the police from searching. In order to establish such a "waiver" the State must demonstrate "an intentional relinquishment or abandonment of a known right or privilege." (*Johnson v. Zerbst*, 304 U.S. 458, 464.) However, these standards were enunciated in *Johnson* in the context of the safeguards of a fair criminal trial, not pertaining specifically to "searches". Notwithstanding, and while not required, the actions of Plaintiff in the instant case do in fact demonstrate a knowing and intelligent waiver on his own behalf, even after advice of counsel alerting Plaintiff of his right *NOT* to consent.

Accordingly, it can be determined from the facts of this case that (1) Plaintiff was not in 'custody' at the time of the search, (2) the Plaintiff was represented by counsel at the time of alleged "search", (3) was advised by counsel that he had a right to refuse the search and in fact did advise him to not consent to the search, (4) notwithstanding counsel's advice Plaintiff knowingly and intelligently voluntarily consented to the search, and (5) Plaintiff was never threatened with insubordination and/or termination if he did not consent to the production of the Subject Building Materials. As such, the resulting production of the Subject Building Materials was not the product of duress and/or coercion. Plaintiff did in fact have knowledge of his right to refusal and was represented by counsel at the time but chose not to head counsel's advice. All of these material facts support the proposition that a reasonable attorney would not have recognized the alleged unconstitutionality of the order at the time it occurred. Consequently, Defendant FILARSKY is entitled to the protection afforded by the doctrine of qualified immunity.

VI. CONCLUSION

For all of the reasons stated above the undisputed facts establish that Defendant FILARSKY'S legal advisory role to the City as independent outside counsel was performed solely at the City's behest, thereby entitling him to the protection of the doctrine of qualified immunity just as another other city official would be. In addition, Defendant FILARSKY could not, under these circumstances, have known that the request for Plaintiff to voluntarily produce the Subject Building Materials would be an unconstitutional "search" in violation of his Fourth and Fourteenth Amendment rights. Moreover, Plaintiff voluntarily consented to the production of the Subject Building Materials without being under the threat of insubordination and/or termination. Accordingly, there is no genuine issue of material fact for such alleged actions, and Defendant FILARSKY is entitled to summary judgment as a matter of law.

Dated: January 12th, 2009

GILBERT, KELLY, CROWLEY &
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By: /s/ Jennifer West
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STEVE A. FILARSKY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NICHOLAS B. DELIA,

Plaintiff,

v.

CITY OF RIALTO, A Public Entity; CITY OF RIALTO FIRE DEPARTMENT, A Public Agency; STEPHEN C. WELLS, Individually and as the Fire Chief for the City of Rialto; MIKE PEEL, Individually and as a Battalion Chief for the City of Rialto, FRANK BEKKER, Individually and as a Battalion Chief for the City of Rialto; STEVE A. FILARSKY, Individually and as an Internal Affairs Investigator for the

Case No.

DECLARATION OF STEVE A. FILARSKY IN SUPPORT OF DEFENDANT STEVE A. FILARSKY'S MOTION FOR SUMMARY JUDGMENT

City of Rialto; and)
DOES 1 THROUGH 10)
INCLUSIVE,)
Defendants.)

I, Steve A. Filarsky, declare as follows:

1. I am a partner at the Law Offices of Filarsky & Watt LLP and am licensed to practice law before all of the courts of the State of California. At all times relevant to this action, I have been employed at the Law Offices of Filarsky & Watt LLP. I have personal knowledge of the facts set forth in this Declaration and, if called as a witness, could and would testify competently to such facts under oath.

2. This Declaration is submitted in support of Defendant STEVE A. FILARSKY'S Motion for Summary Judgment on the Complaint of Plaintiff NICHOLAS B. DELIA (hereinafter referred to as "DELIA").

3. I have been employed by the Law Offices of Filarsky & Watt LLP for twenty-three years. Concurrent with my employment at the Law Offices of Filarsky & Watt LLP I also served as independent outside counsel for the City of Rialto (hereinafter "City") beginning in 1986 through 1987. I then resumed working for the City in September of 1996. I am presently still acting as independent outside counsel for the City.

4. In my capacity as independent outside counsel for the City, I am retained to participate in

internal affairs investigations concerning personnel issues. I have conducted numerous interviews of City employees in connection with such personnel/internal affairs investigations. Throughout my tenure of fourteen years as independent outside counsel for the City I have not only been responsible for conducting interviews in connection with the investigative process of the City's personnel/internal affairs matters, but have also been charged with the responsibility for providing legal analysis, proposing alternative disciplinary actions, drafting correspondence at the direction of City management regarding proposed disciplinary actions, and conducting or participating in legal proceedings/hearings.

5. All of the legal functions I have performed for the City have been at their behest and have solely been based on my experience as a licensed attorney in employment/personnel matters for the past twenty nine years.

6. On September 18, 2006, I conducted an internal affairs interview of DELIA (hereinafter referred to as the "Subject Investigation") regarding a claim of misused sick leave by Plaintiff for an alleged incident occurring on August 18, 2006. The City had videotaped Plaintiff purchasing and loading plywood, lumber and insulation (hereinafter referred to as "Subject Building Materials") at Lowe's Home Improvement Center. The internal affairs interview was recorded and the recording ultimately transcribed into a written transcript. I have reviewed the transcript and it comports with my memory of the Subject

Investigation. (Attached hereto as **Exhibit "A"** is a true and correct copy of the written transcript of recording of the Subject Investigation.)

7. At the time of the September 18, 2006, interview of DELIA, Battalion Chiefs Mike Peel and Frank Bekker, Plaintiff's attorney Stuart Adams, and I were present. Fire Chief Stephen Wells was nearby in the same building and available, although not present in the room for the interview.

8. At the beginning of the interview, I was aware that DELIA had been videotaped purchasing building materials on a "sick day" but I had no idea what he had done with the materials or what his explanation might be. Certainly, I had not anticipated in advance what DELIA's explanation in his defense might be or that at the conclusion of the interview, DELIA would be asked to produce the Subject Building Materials depicted in the video.

9. During the course of the Subject Investigation, when confronted with the video and the suspicion that DELIA was using sick time to work on his remodel project, DELIA volunteered in his own defense that he had in fact not yet incorporated the Subject Building Materials into the project and that the materials remained unused at his residence.

10. After hearing DELIA's explanation, a break was taken in the interview process to discuss this development. It was discussed that if indeed DELIA had not incorporated the insulation into his project, than the investigation would be concluded and

resolved favorably to DELIA with no disciplinary action in connection with that portion of the investigation. This proposal was approved by Chief Wells.

11. Upon reconvening the interview, I specifically informed DELIA *on the record* that if he would simply show Battalion Chiefs Peel and Bekker the Subject Building Materials, the investigation would be concluded favorably to him. As the City's retained independent outside counsel, I requested that DELIA go to his home and produce the Subject Building Materials for his superiors in order to dispel questions relating to the allegation of his misused sick leave. (Attached hereto is a true and correct copy of the written transcript of recording of the Subject Investigation, attached hereto as **Exhibit "A"**, see page 34, lines 1-9).

12. Plaintiff was represented by attorney Stuart Adams in the interview; when DELIA was asked to produce the building materials, Adams opined that the request was inappropriate and that DELIA should refuse to comply. Adams stated that in his opinion the request to see building materials to corroborate DELIA's offered defense was an illegal search; I did not agree and Adams offered no case law or statutory law in support of his opinion. (See, written transcript of recording of the Subject Investigation, attached hereto as **Exhibit "A"**, pg. 34, ln. 10-19).

13. Based on advice of counsel by Mr. Adams, Plaintiff refused to comply with the request to visually

verify the Subject Building Materials to corroborate his own offered defense. (See, written transcript of recording of the Subject Investigation, attached hereto as **Exhibit "A"**, pg. 34, lns. 10-19).

14. The request was then clarified by indicating that the City was not asking to go inside Plaintiff's residence at all but rather wanted Plaintiff to simply go to his house and bring out the Subject Building Materials to the front yard for visual verification while Peel and Bekker waited outside. Again, Adams objected and again DELIA refused to comply.

15. Another discussion took place off the record, after which Defendant Chief Wells converted the *request* to produce the Subject Building Materials into an *order*. (A copy of the written order dated September 18, 2006 and signed by Chief Wells is attached to the Declaration of Jon H. Tisdale as **Exhibit "D"** thereto and is incorporated herein by reference.)

16. Ultimately, Chief Wells had the final authority to order the production of the Subject Building Materials. At the request of Adams, the order was reduced to writing and I handed it to DELIA and Adams at Chief Wells' request.

17. I did not have the authority to unilaterally make an order for DELIA to produce the Subject Building Materials.

18. At no point in time that I was aware of either before or after the order was issued, was Plaintiff ever threatened with insubordination and/or

termination if he did not produce the building materials in support of his story and his defense; the only admonition given was at the commencement of the interview when DELIA acknowledged his obligation to tell the truth.

19. Prior to issuing the order to produce the Subject Building Materials, no less than four union representatives were called by Stuart Adams to the interview. Although I do not believe that they were present for the recorded portion of the interview of DELIA, they were present when DELIA was requested and then subsequently ordered to produce the Subject Building Materials in front of his house. I have no independent recollection of any objection made by any of the four union representatives to either the request or the order.

20. Prior to the issuance of the order and prior to the visit to DELIA'S house, I spoke to then City Attorney Bob Owen on the telephone and advised Mr. Owen of the circumstances surrounding the Subject Investigation, DELIA's explanation offered in his own defense during the interview and the proposed order to produce the insulation to exonerate himself and end the investigation. Mr. Owen posed no objection to the proposed order.

21. I did not personally attend the visit to DELIA's house and have never been to DELIA's home for any reason. I am informed and believe that Battalion Chiefs Peel and Bekker remained in their car, never set foot on DELIA's property and departed after

insulation was brought outside by DELIA, in apparent support of his explanation that the material was not yet incorporated into the project. I am informed and believe that although attorney Adams was present with DELIA at his residence, he did NOT further advise DELIA to refuse to comply with the order and that DELIA in fact voluntarily complied with the written order.

I declare under penalty of perjury, pursuant to the laws of the State of California that the foregoing is true and correct.

Executed this 12th day of January 2009, at Manhattan Beach California.

/s/ Steve A. Filarsky
STEVE A FILARSKY

OPPOSITION
BRIEF

RECORD
AND
BRIEFS

No. 10-1018

Supreme Court, U.S.
FILED
JUN 10 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

◆

STEVE A. FILARSKY,

Petitioner,

v.

NICHOLAS B. DELIA,

Respondent.

◆

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

◆

BRIEF IN OPPOSITION OF RESPONDENT NICHOLAS DELIA

◆

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QUESTION PRESENTED

In *Richardson v. McKnight*, 521 U.S. 399 (1997), this Court held that employees of private prison management firms that contract with state and local governments are not entitled to qualified immunity from constitutional claims brought under 42 U.S.C. section 1983. Although the opinion was not unanimous, all nine Justices agreed that the question of whether private prison guards were entitled to qualified immunity turned on whether such immunity was traditionally available at common law. 521 U.S. at 404-05, 414.

Consistent with that opinion, the Ninth Circuit recently held that Petitioner Filarsky – a for-profit private investigator (who happens to also be an attorney), contracted by a city to participate in an administrative personnel investigation of one of its employees – was not entitled to assert the defense of qualified immunity. The Ninth Circuit's opinion is in complete harmony with this Court's opinion in *Richardson* – requiring that Filarsky show a "firmly rooted" tradition of immunity for private investigators in order to avail himself of the defense of qualified immunity from claims under 42 U.S.C. section 1983.

The question thus presented is:

Whether a for-profit private investigator, contracted by the government to participate in an administrative personnel investigation, is entitled to avail himself of a qualified immunity defense.

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INTRODUCTION

The Ninth Circuit appellate decision ("the appellate decision") below arose out of litigation brought by a firefighter, Nicholas B. Delia ("Delia") against the City of Rialto, City of Rialto Fire Department, Stephen C. Wells ("Chief Wells"), Mike Peel ("Peel"), Frank Bekker ("Bekker"), and Steve A. Filarsky ("Filarsky") (collectively "Defendants").

The appellate decision includes a finding that Delia's Fourth Amendment rights were violated when Delia was ordered, without legitimate cause, to enter his home and produce materials from the inside of his home and display them in public view to his employers on his front yard. The appellate decision further analyzed the various Defendants' qualified immunity arguments and held that because Delia could not demonstrate a constitutional right was clearly established on the date of the order, City employees would not have known that their actions were unlawful. Thus, the City employees were entitled to qualified immunity. However, the appellate decision specifically carved Filarsky, a private investigator who was hired by the City to conduct the personnel investigation, out of that immunity. The appellate decision held that Filarsky was not entitled to qualified immunity.

Filarsky filed this Petition for a Writ of Certiorari. However, the Petition fails to present any "compelling reasons" that might support a grant of certiorari. *See* Sup. Ct. R. 10. Filarsky attempts to overstate his case by arguing that the appellate decision contravenes this Court's opinion in ***Richardson v. McKnight***, 521 U.S. 399 (1997), and further arguing that the appellate decision creates a split in circuits on the doctrine of qualified immunity. However, these claims lack merit.

Filarsky's assertion that the appellate decision contravenes *Richardson* fails after even a cursory review of *Richardson*. Both the Majority and Dissenting Opinions in *Richardson* recognize that private individuals performing certain government functions have been afforded immunity when there is a "firmly rooted" tradition of immunity for those specific functions. In his Petition, Filarsky cannot point this Court to any historical reference suggesting investigators should be afforded immunity. Thus, the appellate decision does not contravene *Richardson*, but rather, is in accord with its principles.

Further, Filarsky's claim that there exists a split among the Circuit Courts on this issue is similarly lacking support. Filarsky's claim of a split relies exclusively on the Sixth Circuit's opinion in *Cullinan v. Abramson*, 128 F.3d 301 (6th Cir.), *cert. denied*, 523 U.S. 1094 (1998), in which the Sixth Circuit granted qualified immunity to outside counsel who, acting as attorneys and representatives, were actively engaged in litigation on behalf of the government. Filarksy's attempts to conflate his role as a private investigator with that of an attorney representing the City of Rialto in litigation, all in the name of creating a conflict among the circuits, is unavailing. Instead, the appellate decision acknowledged *Cullinan* and correctly decided that Filarsky was not entitled to qualified immunity.

The appellate decision does not contravene *Richardson* and there is no conflict with the Sixth Circuit's opinion in *Cullinan*. Simply put, Filarsky has completely failed to carry his burden of demonstrating that there are *any* compelling reasons for this Court to grant his Petition. Accordingly, the Petition should be denied.

◆

STATEMENT OF THE CASE[1]

In July 2000, Delia was hired by the City of Rialto's Fire Department as a firefighter. Pet. App. 5.[2] On August 10, 2006, Delia began to feel ill while working to control a toxic spill. *Id.* He was then transported to a hospital emergency room for evaluation. *Id.* There, a doctor provided Delia with an off-duty work order for three work shifts, but placed no activity restrictions on him. *Id.*

On August 15, 2006, Delia returned to the hospital, at which time the doctor again issued him an off-duty work order. This time it was for eight shifts. *Id.*

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[1] This recitation of background facts is substantially identical to that contained in the Ninth Circuit's Order Amending Opinion and Denying Petition for Rehearing En Banc and Amended Petition. *See* App. to Pet. 1.

[2] All references to "App." shall refer to the Appendix in Filarsky's Petition for Writ of Certiorari.

The doctor also scheduled a medical test for him. *Id.* Again, the doctor did not place any activity restrictions on Delia. *Id.* On August 22, 2006, Delia returned to the hospital and the doctor gave him another off-duty work order for eight shifts. Pet. App. 5-6. Once again, no activity restrictions were placed on Delia. Pet. App. 6. Shortly after this examination, Delia underwent a colonoscopy and endoscopy. *Id.* He was diagnosed with esophagitis, an ulceration of the esophagus, caused by his employment. *Id.* On August 29, 2006, Delia's doctor issued an off-duty order for the period from August 26, 2006, through September 3, 2006. *Id.*

The City became suspicious of Delia's off-work status due to a prior disciplinary matter. *Id.* Delia was previously disciplined for sending improper e-mails, but it is unclear why this would make the City suspicious of Delia's off-work activities. *Id.* In any event, the City hired a private investigator to conduct surveillance on Delia due to the City's suspicions. *Id.* During the surveillance, Delia was filmed buying building supplies at a home improvement store. *Id.* Based on these observations, the City began a formal internal affairs investigation of Delia to determine whether he was off work on false pretenses. *Id.* The City began its internal affairs investigation despite the fact that Delia had no activity restrictions placed on him by his treating physician and the City possessed no evidence to the contrary. *Id.*

As part of the internal affairs investigation, Delia was ordered to appear, on September 18, 2006, at an administrative investigation interview. *Id.* The interview was conducted by Filarsky, a private investigator retained by the City. *Id.* In addition to Filarsky and Delia, Delia's attorney, Stuart Adams, Peel, and Bekker were also present at the interview. Pet. App. 6-7.

Filarsky indicated to Delia that he was obligated to fully cooperate and cautioned Delia that "[i]f at any time it is deemed you are not cooperating then you can be held to be insubordinate and subject to disciplinary action, up to and including termination." *Id.* Filarsky then asked Delia about his home construction projects. *Id.* Delia answered that he had some duct work done on his home and had purchased some rolls of insulation. *Id.* Delia told Filarsky that the rolls were currently sitting in his house. *Id.* Filarsky showed Delia a videotape of Delia purchasing home construction materials, and asked him whether the insulation had been installed. *Id.* Delia told Filarsky that the rolls were still bagged at his house.

Shortly after discussing the insulation rolls with Delia, Filarsky had a private meeting with the "Chiefs," in which Filarsky expressed his desire to order Delia to produce the rolls of insulation for inspection. Pet. App. 7-8. Following this, Filarsky asked Delia to allow Peel to follow him to his house and permit Peel to enter Delia's home to conduct a warrantless search for the insulation there. Pet. App. 8. On the advice of counsel, Delia refused Filarsky's request. *Id.* Unable to obtain Delia's consent to a warrantless search of his home, Filarsky then asked if Delia would volunteer to have Peel follow him to Delia's house, where Delia would bring out the rolls of insulation to show Peel that they had not been installed. Again, on the advice of his counsel, Delia refused Filarsky's request. *Id.*

Unable to get Delia to volunteer, Filarsky orally ordered Delia to produce the rolls of the insulation from his house. *Id.* Delia's attorney questioned Filarsky's authority for issuing such an order (since Filarsky was only a private investigator) and requested that it be in writing. *Id.* Following a break, Delia was presented with a written order to produce the insulation for inspection, which was signed by Chief Wells. *Id.*

Immediately after the interview, Peel and Bekker, in a city vehicle, followed Delia to his house. *Id.* Once there, Peel and Bekker parked along the curb in front of Delia's home. Pet. App. 8-9. Delia went into his home and brought out three to four rolls of insulation and placed them on his lawn. Pet. App. 9. Having confirmed that Delia had been truthful in the investigation, Peel and Bekker then drove away. *Id.*

On May 21, 2008, Delia filed this lawsuit in the United States District Court, Central District of California. *Id.* Defendants subsequently moved for summary judgment, which was granted by the district court. *Id.* The court held that Delia had not established municipal liability against the City. Pet. App. 9-11. It further held that the individual defendants, including Filarsky, were all entitled to summary judgment based on qualified immunity.[3] *Id.*

On April 3, 2009, Delia filed an appeal of the district court's decision granting Defendants' motion for summary judgment. The Ninth Circuit held that the warrantless, compelled search of Delia's home violated his rights under the Fourth Amendment. Pet. App. 14-20. However, based on the Ninth Circuit's finding that the right violated by the unlawful search was not clearly established at the time of the defendants' misconduct, Chief Wells, Peel, and Bekker were entitled to qualified immunity. Pet. App. 20-24.

The Ninth Circuit then turned its attention to whether Filarsky is entitled to qualified immunity, noting that "[u]nlike the other individual defendants in this case, Filarsky is not an employee of the City. Instead, he is a private attorney who was retained by the City to participate in internal affairs investigations." Pet. App. 24. The Ninth Circuit's analysis resulted in its conclusion that Filarsky is not entitled to qualified immunity. Pet. App. 27. Accordingly, it reversed the district court's grant of summary judgment in favor of Filarsky based on qualified immunity and remanded for further proceedings. *Id.*

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[3] The district court's order states that Filarsky, Peel, Bekker and Chief Wells, are all entitled to qualified immunity. However, during the hearing on Filarsky's motion for summary judgment, which predated the order, the district court stated that Wells, Peel, and Bekker were entitled to qualified immunity, but that Filarsky's "conduct did not result in the deprivation of any constitutional right – as a required element for a 1983 claim." The Ninth Circuit attributes this inconsistency to the apparent, mechanical adoption by the district court of the findings of fact and conclusions of law, which were prepared by defense counsel. At any rate, the Ninth Circuit opted to rely exclusively on the district court's written order – that Filarksy is entitled to qualified immunity.

◆

REASONS FOR DENYING FILARSKY'S PETITION

The stated basis for Filarsky's petition is twofold: (1) The Ninth Circuit's holding in this case conflicts with the precedent set by this Court in *Richardson*; and (2) this case highlights a split between the circuits regarding qualified immunity.

However, this case does not conflict with *Richardson* because it does not involve the requisite "special circumstances" necessary to confer qualified immunity on a private individual, as discussed in *Richardson*. Furthermore, there is no "split" between the circuits regarding whether a private individual employed as a contract private investigator is entitled to qualified immunity. Finally, even if Filarsky were correct that the Ninth Circuit incorrectly applied Richardson, that alone would not necessitate review by this Court. *See* Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

I. The Ninth Circuit's Holding Does Not Contravene Supreme Court Authority.

The first of Filarsky's two arguments is that the appellate decision contravenes Supreme Court authority, namely *Richardson*. However, this argument is premised on a mischaracterization of the appellate decision as a *categorical* denial of qualified immunity to government-retained private lawyers. *See* Pet. 15. The error in Filarsky's argument is that the Ninth Circuit did not hold that private attorneys are never entitled to qualified immunity; but instead, that Filarsky, as a private investigator conducting an internal affairs investigation, was not entitled to qualified immunity. Filarsky assumes that because the Ninth Circuit declared that it is not bound to Sixth Circuit precedent, and because it did not offer an overly extensive qualified immunity analysis under *Richardson*, its holding therefore *contravenes* this Court's decision in *Richardson*.

In *Richardson*, the Court discussed two primary factors for determining when a private person sued under 42 U.S.C. section 1983 may avail himself of the qualified immunity normally accorded to public officials: (1) Whether history reveals a firmly rooted tradition of immunity applicable to the type of private actor involved in the case; and (2) whether public policy justifications support the application of qualified immunity. *Id.* at 404. As discussed below, neither of these factors are present in Filarsky's case, which renders the Ninth Circuit's holding is consistent with *Richardson*.

A. Filarsky Is Not Entitled To Qualified Immunity Under *Richardson* Because He Failed To Present Evidence Showing A Firmly Rooted Tradition Of Immunity Applicable To Private Actors Conducting Administrative Personnel Investigations.

The Ninth Circuit began its analysis of whether Filarsky is entitled to qualified immunity by pointing out that "Filarsky is not an employee of the City. Instead, he is a private attorney, *who was retained by the City to participate in internal affairs investigations*." Pet. App. 24 (emphasis added). Filarsky has failed to cite to any cases or historical evidence that would support his claim that private actors conducting administrative personnel investigations enjoyed qualified immunity. Without such evidence, he has failed to establish that he is entitled to raise the defense of qualified immunity.

Petitioner Filarsky's argument in this regard is essentially comprised of nothing more than a summary of *Richardson*, *see* Pet. 16-20, and its passing reference to immunities previously granted to "certain private defendants, such as doctors or lawyers who performed services at the behest of the sovereign." *Richardson*, 521 U.S. at 407 (citing *Tower v. Glover*, 467 U.S. 914, 921 (1984)). The lawyers referred to by the *Richardson* Court when it cited *Tower*, are public defenders. *See Tower*, 467 U.S. at 921.

In contrast to the public defenders in *Tower*, Filarsky "was retained *to act as the City's agent* in its investigation of Respondent Delia." Pet. 31. He was not working in a capacity that might otherwise be entitled to qualified immunity under *Richardson*, such as that of a contract city attorney or a contract public defender. Instead, Filarsky concedes that he was hired to participate in an administrative personnel investigation.

Notwithstanding Filarsky's clever attempts to frame his prior acts as those similar to that of a contract city attorney, rather than an administrative private investigator, there exists no case or any historical evidence that would support his claim that private actors who conduct administrative personnel investigations have enjoyed qualified immunity.[4] As such, he is not entitled to qualified immunity.

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[4] For the first time on appeal before this Court, Filarksy modified the caption on his Petition, by unilaterally adding "ESQ." after his name. This was done despite the fact that the initial complaint listed Filarsky "as an Internal Affairs Investigator for the City of Rialto." However, adding ESQ. to Petitioner's caption hardly changes the character of his actions from that of a private investigator hired to participate in an administrative personnel investigation. As Filarsky concedes in his motion for summary judgment, "[W]e are dealing with a defendant who was retained to represent the City in its investigation of Plaintiff." (App.'s Index of Record, Vol. II, 14:22-23.)

B. The Public Policy Justifications Relied Upon By This Court In *Richardson* Do Not Support Application Of Qualified Immunity.

The second *Richardson* factor – whether public policy justifications support the application of qualified immunity – is virtually ignored in Filarsky's Petition. The *amici curiae* brief filed in support of Petitioner is similarly unhelpful as it ignores the facts of this case. Instead *amici curiae* address only the general argument, framed around hypothetical facts, that municipalities should be able to contract for legal services and that some of those legal service providers should be entitled to qualified immunity. The question of whether private attorneys contracted to perform essential governmental services, such as that of a city attorney or a city manager, should be entitled to qualified immunity is not the issue presented in this appeal. Rather, the real question is whether private actors should be entitled to qualified immunity when they are employed to participate in administrative investigations regarding simple allegations of employee misconduct.

In *Richardson*, this Court discussed policy concerns that might give rise to qualified immunity even in the absence of historical evidence of a firmly rooted tradition of immunity. 521 U.S. at 407-12. The first, and most important, concern giving rise to government immunities is unwarranted timidity. *Id.* at 409. However, explained the Court, the concern regarding unwarranted timidity "is less likely present, or at least is not special, when a private company subject to competitive market pressures" is involved. *Id.* at 409. In the context of private prison contracts, the Court clarified:

> In other words, marketplace pressures provide the private firm with strong incentives to avoid overly timid, insufficiently vigorous, unduly fearful, or "nonarduous" employee job performance. And the contract's provisions – including those that might permit employee indemnification and avoid many civil-service restrictions – grant this private firm freedom to respond to those market pressures through rewards and penalties that operate directly upon its employees. [ ] To this extent, the employees before us resemble those of other private firms and differ from government employees.

Id. at 410 (citation omitted).

While the record does not contain the particulars of Filarsky's contract with the City of Rialto, it appears that these marketplace pressures are present. The City of Rialto can hire any private investigator it wishes to investigate complaints of employee misconduct. Indeed, Filarsky's brief, as well as that of *amici curiae*, is chock-full of references to the growing number of cities contracting out for services with private employers.

As a private investigator hired by the City, Filarsky is a profit-seeking market participant. That is, he faces competition; thus, he must perform efficiently and effectively to retain business. Also, California Rule of Professional Conduct 3-410 requires attorneys who do not carry professional liability insurance to provide notice of that fact to their clients. These marketplace pressures provide an incentive for the City to hire an effective attorney and/or an attorney who carries his own liability insurance.

Unlike Filarsky, "government employees typically act within a *different* system. They work within a system that . . . is often characterized by multidepartment civil service rules that, while providing employee security, may limit the incentives or the ability of individual departments or supervisors flexibly to reward, or to punish, individual employees." 521 U.S. at 410-11. Accordingly, there exists no special immunity-related need for the City's privately-contracted personnel investigators, even if they happen to be attorneys, to encourage vigorous performance.

Next, "privatization helps to meet the immunity-related needs to ensure that talented candidates are not deterred by the threat of damages suits from entering public service." *Id.* at 411 (internal quotation marks and citations omitted). As discussed above, the fact that Filarsky operates outside of civil service restraints, allows the City of Rialto to offset increased employee liability risk with higher pay or extra benefits. As a result, Filarsky, and his competitors, can operate as private firms instead of like typical government departments.

The final policy consideration underlying governmental immunity is whether lawsuits might distract employers from their duties. *Id.* at 411-12. However, "the risk of 'distraction' alone cannot be sufficient grounds for an immunity." *Id.* (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982)). In considering this policy consideration, the *Richardson* Court stated:

> Given a continual and conceded need for deterring constitutional violations and our sense that the firm's tasks are not enormously different in respect to their importance from various other publicly important tasks carried out by private firms, we are not persuaded that the threat of distracting workers from their duties is enough virtually by itself *to justify providing an immunity.*

Id. at 412.

Here, the threat that investigators hired by the City to investigate allegations of employee misconduct will be subjected to a barrage of distracting litigation for violating employees' civil rights is speculative, at best.

In short, there is nothing about the job of conducting administrative investigations into personnel complaints that warrants providing Filarsky with governmental immunity. His job is one that private industry might, or might not, perform; and which does not have a firmly rooted tradition of immunity applicable for private actors. Because there are no special reasons significantly favoring an extension of governmental immunity, the Court should hold that Filarsky, unlike those who work directly for the City of Rialto, does not enjoy immunity from suit under Section 1983.

C. Filarsky Would Not Be Entitled To Qualified Immunity Under The "Functional Approach" Analysis Discussed In The *Richardson* Dissent.

Filarsky argues that he would be entitled to qualified immunity under the *Richardson* dissent's functional approach. Pet. 26-30. However, the *Richardson* majority rejected that approach: "[A] purely functional approach bristles with difficulty, particularly since, in many areas, government and private industry may engage in fundamentally similar activities, ranging from electricity production, to waste disposal, to even mail delivery." *Richardson*, 521 U.S. at 409. Allowing Filarsky to avail himself of qualified immunity by applying a framework previously rejected by this Court is inconsistent with the doctrine of *stare decisis*. *See, e.g.*, *Payne v. Tennessee*, 501 U.S. 808, 848 (1991) ("The overruling of one of this Court's precedents ought to be a matter of great moment and consequence.").

Notwithstanding this, Filarsky's theoretical entitlement to qualified immunity under such a rejected approach would not cast doubt on the Ninth Circuit's holding. Contrary to Filarsky's assertion, he would not be entitled to qualified immunity even if the Court chose to apply the functional approach discussed in the *Richardson* dissent. Justice Scalia, the author of that dissent, recognized that "[p]rivate individuals have regularly been accorded immunity when they perform a governmental function *that qualifies*." *Richardson*, 521 U.S. at 417 (emphasis added). Under the dissent's functional approach, "immunity is determined by function, not status." *Id.* at 416. Applying that approach, the dissent determined that the private prison guards performed the type of governmental function that should invoke qualified immunity.

However, the function of the private prison guards in *Richardson* stands in sharp contrast to that of Filarsky, who was employed by the City to conduct administrative personnel investigations regarding employee misconduct – not to "perform a prototypically governmental function (enforcement of state-imposed deprivation of liberty) . . . that gives rise to qualified immunity." *Id.*

More specific to attorneys, Justice Scalia also discussed the policies underlying immunity granted to private actors functioning as grand jurors, prosecutors, judges, and witnesses in court proceedings. Turning to private attorneys, the dissent explained: "I think it highly unlikely that we would deny prosecutorial immunity to those private attorneys increasingly employed by various jurisdictions in this country to conduct high-visibility criminal prosecutions." *Id.* at 418 (citations omitted). The common thread between all of these private actors – a thread not shared by Filarsky – is the fact that they are all "integral parts of the judicial process." *Id.* (quoting *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983)). Filarsky, by conducting an internal administrative investigation into employee misconduct, was not completing even a quasi-judicial function.

In short, Filarsky cannot escape the facts of this case. Unless the duties of private, administrative personnel investigators are stretched so far as to label them integral to the judicial process, Filarsky cannot avail himself of the defense of qualified immunity under the functional approach.

II. The Ninth Circuit's Opinion Does Not Create A Split In The Circuits.

Filarsky argues that the Ninth Circuit's opinion creates a circuit split on the doctrine of qualified immunity by mischaracterizing the opinion as a *categorical* denial of qualified immunity to all government-retained private lawyers. Pet. 30-35. The supposed circuit split that Petitioner attempts to create is based solely on the Sixth Circuit's decision in *Cullinan v. Abramson*, 128 F.3d 301 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998). However, the facts in *Cullinan* bear almost no resemblance to those of this case, and the Ninth Circuit's decision regarding Filarsky hardly creates a Circuit split vis-à-vis the Sixth Circuit's decision in *Cullinan*.

In *Cullinan*, the Sixth Circuit held that a city's outside legal counsel was entitled to qualified immunity. The court stated, "We see no good reason to hold the city's in-house counsel eligible for qualified immunity and not the city's outside counsel." *Id.* However, the *Cullinan* Court failed to offer a reasoned analysis for its decision. The fact that neither the Sixth Circuit in *Cullinan*, nor the Ninth Circuit in this case, analyze their respective facts under the *Richardson* rubric makes it impossible to declare a split between the Circuits. Filarsky's assumption that the litigation attorneys in *Cullinan* are similarly situated to *Filarsky*, an administrative personnel investigator who happens to also be an attorney, does not constitute evidence of a Circuit "split."

Filarsky's attempt to marry this case to *Gonzalez v. Spencer*, 336 F.3d 832 (9th Cir.), *cert. denied*, 540 U.S. 940 (2003) is equally unavailing.[5] While it is true that the *Gonzalez* court held that a private attorney was not entitled to qualified immunity, the holding in *Gonzalez* was not the product of a comprehensive analysis under *Richardson*; instead, the court's holding was based on the fact that the private attorney (defendant) failed to establish a record supporting the grant of qualified immunity. *Compare Gonzalez*, 336 F.3d at 835 ("Spencer . . . *has pointed to* 'no special reasons significantly favoring an extension of governmental immunity' to private parties in her position." (quoting *Richardson*, 521 U.S. 399) (emphasis added)), *with Richardson*, 521 U.S. at 412 ("Our examination of history and purpose thus reveals nothing special enough about the job or about its organizational structure that would warrant providing these private prison guards with a governmental immunity.").

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[5] While Filarsky's Petition concedes that "the doctrine of qualified immunity was not even at issue and was not briefed in *Gonzalez*," Pet. 12, it goes on to include a full analysis of the case, Pet. 33-34.

Further underscoring the fact that the *Gonzalez* holding is not the product of the *Richardson* framework applied to an adequate factual record is its two-sentence discussion of qualified immunity:

> Spencer is not entitled to qualified immunity. She is a private party, not a government employee, and she has pointed to "no special reasons significantly favoring an extension of governmental immunity" to private parties in her position. *See Richardson v. McKnight*, 521 U.S. 399, 412, 117 S.Ct. 2100, 138 L.Ed.2d 540 (1997).

Gonzalez, 336 F.3d at 835. In short, the appellate decision correctly cites *Gonzalez* for the general principle that private parties who cannot establish special reasons significantly favoring an extension of governmental immunities to them in their positions are not entitled to a grant of qualified immunity. Pet.

App. 26.[6] The mere fact that the Ninth Circuit opted not to author an extensive analysis under *Richardson* in this case does mean that its holding "is in direct conflict with" *Richardson*. Pet. 13.

Finally, Filarsky's perception that the holdings of *Gonzalez* and *Cullinan* are incompatible matters not. The appeal here is from the present matter, involving Filarsky, a for-profit private investigator. The unique facts presented in this appeal, with Filarksy hired, not as an attorney to represent the government in litigation, but rather as an investigator to conduct an employee investigation, take this case far outside the holdings of *Gonzalez* and *Cullinan*. The appellate decision is in line with this Court's holding in *Richardson*. Had the Ninth Circuit elected to extend qualified immunity to Filarsky, an attorney hired to conduct administrative personnel investigations of city employees, the exception would swallow the rule – government immunity would be extended so as to apply to *any* attorney hired by *any* public entity for *any* purpose. That would clearly be inconsistent with the stated goals and objectives of qualified immunity under *Richardson*.

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[6] The Ninth Circuit had no reason to doubt the weight of *Gonzalez*, given this Court's denial of certiorari in that case. *See Gonzalez v. Spencer*, 336 F.3d 832 (9th Cir.), *cert. denied*, 540 U.S. 940 (2003).

III. The Petition Should Be Denied Because The Facts Of This Case Create A Poor Vehicle For Deciding The Questions Presented By Petitioner.

As discussed above, this case does not involve the type of "special circumstances" present as contemplated by *Richardson*. Instead, it involves a private investigator, who was retained by the City to participate in internal affairs investigations." Pet. App. 24. Filarsky has presented no evidence to the Ninth Circuit of a firmly rooted tradition of immunity applicable to his situation. As discussed above, the public policy justifications do not support the application of qualified immunity.

Contrary to Filarsky's suggestion, this is not the case to decide whether outside attorneys, hired to represent the government in litigation, should be entitled qualified immunity. Filarsky was not hired for that purpose.

Furthermore, Filarsky's petition is not about a "split" between the circuits. The unique facts presented by Filarsky's position as an outside private investigator, do not warrant review at this time. There are no other circuits that have addressed this issue and there is no compelling reason for this Court to do so at this time.

Instead, this Petition is simply about Filarsky's belief that the Ninth Circuit misapplied *Richardson* to the facts of this case. That mistaken belief, however, does not justify a grant of certiorari. *See* Supreme

Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NICHOLAS B. DELIA,

Plaintiff,

vs.

CITY OF RIALTO, A Public Entity; CITY OF RIALTO FIRE DEPARTMENT, A Public Agency; STEPHEN C. WELLS, Individually and as the Fire Chief for the City of Rialto; MIKE PEEL, Individually and as a Battalion Chief for the City of Rialto, FRANK BEKKER, Individually and as a Battalion Chief for the City of Rialto; STEVE A. FILARSKY, Individually

Case No.:
CV 08-03359 R-PLAx

PLAINTIFF'S RESPONSE AND OPPOSITION TO DEFENDANT STEVE A. FILARSKY'S MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY ADJUDICATION OF ISSUES; MEMORANDUM OF POINTS AND AUTHORITIES

and as an Internal Affairs Investigator for the City of Rialto; and DOES 1 THROUGH 10 INCLUSIVE;	))))	Hearing Date: February 2, 2009 Time: 10:00 a.m. Courtroom: 8
Defendants.	)))))))))))	Filed Concurrently With: 1. Plaintiff's Statement of Uncontroverted Facts and Conclusions of Law; 2. Declaration of Nicholas Delia; 3. Declaration of Sanjay Bansal

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant, attorney Steve A. Filarsky ("Filarsky") must be a fan of dodge ball, for he is attempting to dodge all the facts in this case. Unfortunately for Filarsky, the facts presented in this case are ones that he can not successfully avoid, and as such he must be held liable for his violation of Plaintiff Nichols Delia's ("Delia") Constitutional rights.

The thrust of Delia's complaint against Filarsky is straightforward. As Filarsky concedes, he was acting under color of state law for purposes of section 1983. Filarsky violated Delia's Fourth Amendment rights by participating and ordering the illegal search of Delia's home.

Filarsky is not entitled to qualified immunity due to the fact, 1) in light of the facts taken most favorably towards Delia, Filarsky's conduct violated Delia's Constitutional rights, and 2) the Constitutional right was clearly established at the time Filarsky acted. There is an inherent overlap between the first-prong of this defense, and determining whether a violation occurred.

Finally, the facts demonstrate that Delia did not consent to the search of his home. Initially, Filarsky attempted to receive Delia's consent, however upon being unsuccessful, he ordered Delia to allow the search and even had the order reduced to writing. Filarsky's attempt to characterize the search as being consensual is absurd.

II. STATEMENT OF FACTS

A. Background

Plaintiff Nicholas Delia ("Delia") has been and is currently employed as a firefighter/paramedic (SUF 38)[1] with the City of Rialto since July 2000 (SUF 39).

B. Delia's Injury on Duty

On August 10, 2006, while on duty, Delia began to feel ill while assisting in the clean up of a toxic spill (SUF 40). Thereafter, Delia went to the hospital emergency room, and was told by the doctor that more tests needed to be performed. The doctor issued an off-duty work order for a period of three shifts (SUF 41). The doctor informed Delia that he was "bleeding somewhere" and ordered him to take an iron and potassium supplement (SUF 42). The doctor did not place any activity restrictions on Delia, however he did tell him to "take it easy" (SUF 43). Delia went back to the fire station to retrieve his personal items, and at that point, at the behest of the City, filled out an Occupational Injury Report and Workers Compensation form (SUF 44).

On August 15, 2006 Delia returned to the hospital. The doctor issued an off-duty work order for a period of eight shifts. Yet again, the doctor did not place any activity restrictions on Delia (SUF 45). The doctor decided to schedule Delia for a colonoscopy in order to determine where the bleeding was originating (SUF 46).

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[1] "SUF" refers to Plaintiff's Separate Statement of Uncontroverted Facts.

On August 22, 2006 Delia returned to the hospital. The doctor issued an off-duty work order for a period of eight shifts. Yet again, the doctor did not place any activity restrictions on Delia. Shortly thereafter, Delia underwent a colonoscopy and endoscopy (SUF 47).

On August 29, 2006 Delia returned to the hospital. The doctor issued an off-duty work order for a period spanning August 29, 2006 – September 3, 2006. Delia was diagnosed with esophagitis (ulcer in the esophagus) (SUF 48). The doctor cleared Delia to return to work after September 3, 2006 (SUF 49).

Unbeknownst to Delia, and for reasons unknown to Delia, the City decided to conduct an investigation into Delia's off-work status (SUF 50). The City hired an investigative agency in order to follow Delia and determine the veracity of Delia's injury on duty claim and subsequent medical leave (SUF 51). This is especially interesting in light of the fact that the doctor did not place any activity restrictions on Delia whatsoever.

The City's investigator spied on Delia for a few days. On one of these days, the investigator filmed Delia purchasing a couple of rolls of fiberglass insulation at the local Lowe's store (SUF 52).

C. The Interview

On September 18, 2006, Delia was order to appear at the Rialto Fire Department for an administrative investigative interview concerning the aforementioned City investigation. Filarsky, an attorney hired by the City, conducted the interview (SUF 53). Present during the interview aside from Filarsky, were Peel, Bekker, Delia and Stuart Adams ("Adams"), Delia's attorney (SUF 54). The interview was tape recorded and transcribed. The parties agree that the Transcript is an accurate reflection of what was said during the interview (SUF 55).

The interview commenced at 10:02 a.m. At the onset of the interview, and pursuant to Filarsky's direction, Peel issued the following admonishment "Nick [Delia] you are ordered to be here today and you are to answer the questions truthfully" (SUF 56). Filarsky then began to question Delia about his injury. Filarsky first pried into Delia's medical condition and then transitioned into questions concerning the video footage obtained by the City investigator. Specifically, Filarsky focused in on the footage of Delia purchasing the rolls of insulation (SUF 57). Filarsky questioned Delia as to whether the insulation had been installed or not. Delia stated that the insulation had not been used as of yet, and was sitting in his kitchen (SUF 58). At approximately 11:13 a.m. Filarsky ordered a break and requested that Delia and Adams step outside while Filarsky conferred with Peel and Bekker (SUF 59). At approximately 11:25

a.m. the break concluded and the interview continued (SUF 60).

D. The Order

Upon return from this break, Filarsky told Delia that he wanted to search Delia's home in order to ensure that the rolls of insulation were not installed and in his kitchen, "[w]hat I want to do is to verify that after you leave here today. So I would like Chief Peel to follow you home to your personal residence and to have you to allow him access to view those building materials where they are." (SUF 61). Adams immediately objected to Filarsky's request and advised Delia to not consent to the search of his home. Delia followed Adams advice. Instead of searching Delia's home, Filarsky then changed the request to having Peel follow Delia home, and having Delia go inside his home, retrieve the personal property (insulation) and show Peel the personal property. Again, Adams objected, and again Delia denied Filarsky's search request (SUF 62).

Upon being unsuccessful in obtaining Delia's voluntary consent, Filarsky order Delia to go into his home, retrieve the personal property and show Peel the property, "[n]ow we are going to order you to remove those three bundles of insulation." (SUF 63). Adams continuously and vociferously raised many objections, specifically Fourth Amendment objections, and informed everybody present in the room that they are exposing themselves to civil liability due to the Constitutional violations (SUF 64). Adams questioned Filarsky's authority to issue such an order. Filarsky addresses this issue, "I will have the authority after I describe the order; we will issue the order from the Department so that you fully understand it." (SUF 65). Filarsky also stated, "I am issuing the order on behalf of the Department." (SUF 66). Adams went on to question Filarsky's authority, to which Filarsky replied, "And at the end when we are done with the orders, they will ratify the order and then go off." At approximately 11:35 a.m. another break was taken. Upon return, Adams reiterated what he perceived to be Filarsky's order. Also present at this time was a labor union representative, who provided feedback regarding the governing MOU (SUF 67). Adams stated that he wanted a written order detailing what Delia was being ordered to do. At approximately 11:44 a.m. another break was taken (SUF 68). The interview resumed at approximately 1:50 p.m. at which point, Filarsky presented a written order, to Adams and Delia (SUF 69). Wells signed the order (SUF 70). (*Exh.* A).

It is important to note, that this order was issued, even though **Filarsky believed Delia was not lying**. In reference to Delia and the insulation rolls not being used and in his kitchen, Filarsky states, "I have no reason to disbelieve that, however, a skeptical or cynical view would be you are not telling the truth." (SUF 71).

E. The Search

Delia's interview concluded at approximately 1:53 p.m. Thereafter, Peel and Bekker, in a City vehicle, followed Delia to his house (SUF 72). Adams arrived approximately ten minutes after Delia, Peel and Bekker (SUF 73). Peel and Bekker were parked alongside the curb in front of Delia's house (SUF 74). Pursuant to the order, Delia then went into his house, retrieved his personal items, and placed them on his front lawn (SUF 75). Perched in the City vehicle, Peel and Bekker watched Delia and looked at the personal items laid out on Delia's lawn. Peel and Bekker left shortly thereafter (SUF 76).

III. STANDARD OF REVIEW

Because summary judgment is a "drastic device," cutting of a party's right to present its case to a jury, the moving party bears a "heavy burden" of demonstrating the absence of any triable issue of material fact. *Nationwide Life Ins. Co. v. Bankers Leasing Ass'n, Inc.*, 182 F.3d 157, 160 (2nd Cir. 1999).

IV. ARGUMENT

A. DEFENDANTS ENGAGED IN A CONSTITUTIONAL VIOLATION OF DELIA'S FOURTH AMENDMENT RIGHTS

i. The Sanctity of the Home

The Courts have long recognized the sanctity of an individual's home. "[T]he protective force of the fourth amendment [is no] more powerful than it is when the sanctity of the home is involved." *Los Angeles Police Protective League v. Gates*, 907 F.2d 879, 884 (9th Cir.1990). This is not a new or novel concept, but one entrenched within American law and carried over from English law, "[t]hat a person's home is the one place most resolutely protected under the Fourth Amendment arises from a view, as old as the common law, that '[t]he house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose.'" *Wilson v. Layne*, 526 U.S. 603, 609-10, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999) (quoting Semayne's Case, (1604) 77 Eng. Rep. 194, 195 (K.B.)).

At first, Filarsky attempted to receive permission from Delia in order to conduct a search of his home. Delia denied the request. Next, Filarsky ordered Delia to go into his house and bring the personal items outside so that Peel and Bekker could view them. None of the Defendants possessed any type of warrant. No exigent circumstances were present. As a matter of fact, Filarsky did not even posses any reasonable cause for the search let alone probable cause. As Filarsky stated, he had no reason to "disbelieve" Delia. It is clear Defendants were not entitled to enter Delia's home and conduct a search. It is also clear that they were not entitled to threaten Delia with insubordination and force him to produce personal items from his home.

ii. The Unlawful Threat

The Fourth Amendment applies to searches conducted in administrative investigations. *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523 (1967). Further, public employees are entitled to Constitutional protections. Levying the threat of insubordination against an employee in order to force the employee to waive their Constitutional rights is not allowed. *Gardner v. Broderick*, 392 U.S. 273 (1968); *see also Uniformed Sanitation Men Ass'n v. City of New York*, 392 U.S. 280 (1968); *Spevak v. Klein*, 385 U.S. 511 (1967); *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 859 F.2d 276 (3rd Cir. 1988). The state is not permitted to use the threat of insubordination in an "an attempt to coerce [employees] to relinquish their constitutional rights." *Uniformed Sanitation Men Ass'n*, 392 U.S. at 285.

Delia was threatened with insubordination if he failed to follow the orders issued by Defendants. Delia was forced to forsake his Fourth Amendment rights, even in light of the fact that Filarsky did not posses a scintilla of evidence or belief that Delia was lying. This threat of insubordination in order to circumvent rights afforded to Delia by the Constitution is not permitted. Without a lawful warrant and without any basis, Filarsky violated Delia's rights.

iii. Delia Did Not Consent to the Search

Filarsky attempts to argue that Delia actually consented to the search. His entire argument is undermined by the fact that Filarsky first explicitly tried to receive Delia's voluntary consent, and upon being unsuccessful in that endeavor, orders Delia to comply with the search. **It is utterly, explicitly clear that Filarsky ordered Delia to comply with the search.** Finally, inherently giving "consent" and "ordered" do not mix, however Filarsky attempts to gloss over this distinction. Taken to an extreme, Filarsky's convoluted logic would result in a situation wherein a mugger could point a gun at an individual and simply say, "I order you to give me your wallet," and then assert a successful defense of consent during the prosecution.

iv. Delia's Reasonable Expectation of Privacy

In applying the two part test delineated in *Katz v. United States*, 389 U.S. 347 (1967), it is clearly established that a search occurred in Delia's situation. The two-part test adopted by the Court as the definition of a search for Fourth Amendment purposes is essentially: (1) governmental action must contravene an individual's actual, subjective expectation of privacy; (2) and that expectation of privacy must be reasonable, in the sense that society in general would recognize it as such. What it boils down to is whether the individual posses a reasonable expectation of privacy. *U.S. v. Duran*, 189 F.3d 1071, 1084-1085 (9th Cir. 1999) (citing *Katz*).

Here, Delia possess an expectation of privacy of not only his personal items, but his personal items in his home (the kitchen). These are not items he brought with him to the interview. These are personal items stored at his home. Further, Delia's expectation of privacy is reasonable in that the home is afforded the highest level of protection under the Fourth Amendment as discussed before. Delia's home is his castle and refuge. **Delia's reasonable expectation of privacy is clearly established law stemming back at least forty years.**

If Filarsky's actions are not construed as an unlawful search, then in the future the City of Rialto can follow an employee home and order the employee to go into their home and produce the most personal and intimate of items from their bedroom for view by their supervisors, without any type of warrant. They could make this order **even if** they lacked any basis for suspicion of wrongdoing by the employee, as is the situation with Delia.

B. FILARSKY CAN NOT SUCCESSFULLY ASSERT QUALIFIED IMMUNITY AS A DEFENSE

In analyzing whether a public official (Filarsky) is entitled to qualified immunity, a two-pronged test is applied to determine: (1) whether the facts alleged, taken in the light most favorable to the party asserting the injury, show that the official's conduct violated a constitutional right, and if so, (2) whether the right was clearly established at the time the official acted. *CarePartners, LLC v. Lashway*, 545 F.3d 867, 875 (9th Cir. 2008); *see also Fogel v. Collins*, 531 F.3d 824, 829 (9th Cir. 2008) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

i. The First Prong

Here, taking the facts as applied to Delia's situation, let alone applying these facts in the most favorable light to Delia, yields a result wherein Delia's Fourth Amendment Constitutional rights were violated. Delia was given an order, under the threat of insubordination, that he must enter his home and retrieve his personal items for Defendants to view. The sanctity of Delia's home was invaded. This Constitutional violation, and the absurd implications which would follow if it were not deemed a Fourth Amendment violation, are discussed in greater detail above.

ii. The Second Prong

A clearly-established right exists, under qualified immunity analysis, if in the light of pre-existing law the unlawfulness is apparent; in other words, there must be some parallel or comparable factual pattern to alert an officer that a series of actions would violate an existing constitutional right, but it is not necessary that the very action in question has previously been held unlawful. *Fogel v. Collins*, 531 F.3d 824, 833 (9th Cir. 2008); *see also Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Wilson v. Layne*, 526 U.S. 603, 615 (1999).

In addition, the standard for qualified immunity is objective "an officer's subjective understanding of the constitutionality of his or her actions is irrelevant." *Fogel*, 531 F.3d at 833; *see also Anderson*, 483 U.S. at 641. In determining whether the officer is entitled to qualified immunity, the court reviews the information the officer possessed to determine whether a reasonable official in a particular factual situation should have been on notice that his or her conduct was illegal. *Inouye v. Kemna*, 504 F.3d 705 (9th Cir. 2007); *see also Saucier*, 533 U.S. at 202. Therefore the standard delineated is one wherein a reasonable officer placed in the specific factual scenario would be on notice of the Constitutional violation. This standard is purely objective.

In determining what is a clearly established Constitutional violation, the Court may "look to all available decisional law," thus, other circuits and district courts. *Inouye* 504 F.3d at 714.

Here, the right to be secure in one's own home is a Constitutional right that has been established since the days of yore. As discussed above, the inviolability of an individual's home is a principle stemming from English law as far back as the sixteen hundreds. This principle has been incorporated into

American jurisprudence. Defendants violated this right by ordering Delia to enter his home and produce the personal items.

In terms of evaluating whether a search occurred due to the fact that Defendants did not enter Delia's property, the *Katz* decision provides guidance. *Katz* was decided over **forty years ago**. As discussed prior, in applying the test *Katz* expounds to Delia's situation in order to determine if a search has occurred, it is simple to conclude that Delia possessed a subjective expectation of privacy in personal items in his kitchen, and a reasonably objective expectation of privacy in his home, as recognized by society.

As discussed in *Fogel*, it is not even necessary that the situation to be adjudicated by the Court is one wherein the action has been ruled unconstitutional in a prior decision. However, in Delia's situation, cases containing similar fact patterns do exist, making Defendants' actions even more egregious. These cases rule that the actions similar to those that Delia was subjected to are unconstitutional.

There have been several cases where a public entity employer levels a threat of insubordination at the employee in order to conduct a search under the meaning of the Fourth Amendment. For purposes of the Fourth Amendment, "[w]hat matters is the intrusion on the people's security from governmental interference." *Lesher v. Reed*, 12 F.3d 148, 150 (8th Cir. 1994) (citing *Soldal v. Cook County, Ill.*, 506 U.S. 56 (1992)); *see also Sabin v. Miller*, 423 F.Supp.2d 943, 947 (S.D. Iowa 2006) (Plaintiff's public entity employer, in the midst of conducting an investigation, requested Plaintiff to retrieve her personal computer from her home. Defendants went with Plaintiff to her home). In *Lesher*, Defendants threatened Plaintiff (police officer) with termination, unless he allowed them to seize a police dog from his home. The police dog had bitten a young child. Plaintiff relented and allowed the officers to take the police dog. Finding a per se Fourth Amendment violation, the Court ordered the case remanded in order to determine if the violation was reasonable. In *Los Angeles Police Protective League v. Gates*, 907 F.2d 879 (9th Cir.1990), the Court decided that Defendants violated Plaintiff's Fourth Amendment rights by conducting a search of his garage, even though Defendants had an administrative warrant. "If a police officer were required to open up his home whenever there was a reasonable suspicion that evidence may be found there, then officers truly would have watered-down constitutional rights. They, like the rest of the people, must be able to retreat to a safe place free from the prying eyes of even the most well-intentioned employer." *Id.* at 886. **This decision came down from the 9th Circuit over eighteen years ago.**

Filarsky did not question Delia's veracity. Filarsky states, he has no reason to "disbelieve" Delia regarding the insulation not being used and located in his home. No reasonable, let alone probable cause existed for the search. Additionally, Filarsky lacked any type of warrant whatsoever.

iii. Individual Liability

Filarsky can not avail himself of qualified immunity. As discussed above, the first prong of the test is met. In regard to the second prong, the objective test is whether a reasonable officer placed in the specific factual scenario would be on notice of the Constitutional violation. That is the situation in Delia.

Filarasky has no excuse. He is an **attorney** practicing as such **since 1980**. He did not "disbelieve" Delia, and he engaged in a heated exchange with Adams regarding possible Fourth Amendment violations. However, he still moved forward with the actions. The least who could have done was looked up *Katz* on the Internet, or simply perform an Internet search on search and seizure law. If Filarsky chose to act reasonably, he could have called up a law clerk, a first year law student, someone at his office, or perhaps the City of Rialto Police Department to seek advice. Most importantly, he could have **waited**, as there were no exigent circumstances present. He could have engaged in further discussion with Adams. He could have availed himself of many options during one of the numerous breaks. The important point is that he chose not to, and instead opted to follow through with the contemplated illegal action. He did not act as a reasonable official would.

V. CONCLUSION

For the foregoing reasons, Robinson respectfully requests that this Court deny the Defendants' motion for summary judgment.

Dated: January 19, 2009 Respectfully submitted,

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NICHOLAS B. DELIA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NICHOLAS B. DELIA, Plaintiff, vs. CITY OF RIALTO, A Public Entity; CITY OF RIALTO FIRE DEPARTMENT, A Public Agency; STEPHEN C. WELLS, Individually and as the Fire Chief for the City of Rialto; MIKE PEEL, Individually and as a Battalion Chief for the City of Rialto, FRANK BEKKER, Individually and as a Battalion Chief for the	Case No.: CV 08-03359 R-PLAx **DECLARATION OF NICHOLAS DELIA IN OPPOSITION TO DEFENDANT FILARSKY'S MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE MOTION FOR SUMMARY ADJUDICATION OF ISSUES** Hearing Date: February 2, 2009 Time: 10:00 a.m. Courtroom: 8

City of Rialto; STEVE A. FILARSKY, Individually and as an Internal Affairs Investigator for the City of Rialto; and DOES 1 THROUGH 10 INCLUSIVE; Defendants.	*Filed concurrently with:* 1. Plaintiff's Opposition to Defendant's Motion for Summary Judgment; Memorandum of Points and Authorities; 2. Plaintiff's Statement of Uncontroverted Facts and Conclusions of Law; 3. Declaration of Sanjay Bansal

DECLARATION OF NICHOLAS DELIA

I, Nicholas Delia, declare:

1. I make this declaration based on my own personal knowledge and if called to testify, I could and would do so competently as follows. I am currently a firefighter with the City of Rialto. I have been employed as a firefighter for the City of Rialto since July 2000.

2. On August 10, 2006, while on duty, I began to feel ill while assisting in the clean up of a toxic spill. I went to the hospital emergency room, and was told by the doctor that more tests needed to be performed. The doctor issued me an off-duty work order for a period of three shifts. The doctor informed me that I was "bleeding somewhere" and ordered me to take an iron and potassium supplement. The doctor did not place any activity restrictions on me, however he did

tell me to "take it easy." I went back to the fire station to retrieve my personal items, and at that point, at the behest of the City, I filled out an Occupational Injury Report and Workers Compensation form.

3. On August 15, 2006 I returned to the hospital. The doctor issued me an off-duty work order for a period of eight shifts. Yet again, the doctor did not place any activity restrictions on me. The doctor decided to schedule me for a colonoscopy in order to determine where the bleeding was originating.

4. On August 22, 2006 I returned to the hospital. The doctor issued me an off-duty work order for a period of eight shifts. Yet again, the doctor did not place any activity restrictions on me. Shortly thereafter, I underwent a colonoscopy and endoscopy.

5. On August 29, 2006 I returned to the hospital. The doctor issued me an off-duty work order for a period spanning August 29, 2006 – September 3, 2006. I was diagnosed with esophagitis (ulcer in the esophagus). The doctor cleared me to return to work after September 3, 2006.

6. Unbeknownst to me, and for reasons unknown to me, the City decided to conduct an investigation into my off-work status. The City hired an investigative agency in order to follow me and determine the veracity of my injury on duty claim and subsequent medical leave.

7. The City's investigator spied on me for a few days. On one of these days, the investigator filmed me

purchasing a couple of rolls of fiberglass insulation at the local Lowe's store.

8. On September 18, 2006, I was order to appear at the Rialto Fire Department for an administrative investigative interview concerning the aforementioned City investigation. Steven Filarsky, an attorney hired by the City, conducted the interview. Present during the interview aside from Filarsky, were Mike Peel, Frank Bekker, and Stuart Adams, (my attorney). The interview was tape recorded and transcribed ("Transcript").

9. The interview commenced at 10:02 a.m. At the onset of the interview, and pursuant to Filarsky's direction, Peel issued the following admonishment to me "you are ordered to be here today and you are to answer the questions truthfully." Filarsky then began to question me about my injury. Filarsky first pried into my medical condition and then transitioned into questions concerning the video footage obtained by the City investigator. Specifically, Filarsky focused in on the footage of me purchasing the rolls of insulation. Filarsky questioned me as to whether the insulation had been installed or not. I stated that the insulation had not been used as of yet, and was sitting in my kitchen. At approximately 11:13 a.m. Filarsky ordered a break and requested that Adams and I step outside while Filarsky conferred with Peel and Bekker. At approximately 11:25 a.m. the break concluded and the interview continued.

10. Upon return from this break, Filarsky told me that he wanted to search my home in order to ensure that the rolls of insulation were not installed and were in my kitchen. Regarding the insulation, he said, "[w]hat I want to do is to verify that after you leave here today. So I would like Chief Peel to follow you home to your personal residence and to have you to allow him access to view those building materials where they are." Adams immediately objected to Filarsky's request and advised me to not consent to the search of my home. I followed Adams advice. Instead of searching my home, Filarsky then changed the request to having Peel follow me home, and having me go inside my home, retrieve my personal property (insulation) and show Peel my personal property. Again, Adams objected, and again I denied Filarsky's search request.

11. Upon being unsuccessful in obtaining my permission to conduct the search, Filarsky order me to go into my home, retrieve my personal property and show Peel the property. He said, "[n]ow we are going to order you to remove those three bundles of insulation." Adams continuously and vociferously raised many objections, specifically Fourth Amendment objections, and informed everybody present in the room that they are exposing themselves to civil liability due to the Constitutional violations. Adams questioned Filarsky's authority to issue such an order. Filarsky addresses this issue by saying, "I will have the authority after I describe the order; we will issue the order from the Department so that you fully

understand it." Filarsky also stated, "I am issuing the order on behalf of the Department." Adams went on *to question Filarsky's authority, to which Filarsky replied, "And at the end when we are done with the* orders, they will ratify the order and then go off." At approximately 11:35 a.m. another break was taken. Upon return, Adams reiterated what he perceived to be Filarsky's order. Also present at this time was a labor union representative, who provided feedback regarding the governing MOU. Adams stated that he wanted a written order detailing what I was being ordered to do. At approximately 11:44 a.m. another break was taken. The interview resumed at approximately 1:50 p.m. at which point, Filarsky presented a written order, to Adams and myself. Wells signed the order.

12. In reference to the insulation rolls not being used and in his kitchen, Filarsky stated to me, "I have no reason to disbelieve that, however, a skeptical or cynical view would be you are not telling the truth."

13. Chief Stephen Wells signed the order that was given to on September 18, 2006. Attached hereto as Exhibit "A" are true and correct copies of selected pages from that order, with the relevant cited portions underlined.

14. The Transcript of my interview conducted on September 18, 2006 at the City of Rialto Fire Department is an accurate reflection of statements made during the interview. Attached hereto as

Exhibit "B" are true and correct copies of selected pages from that Transcript, with the relevant cited portions underlined.

15. My interview concluded at approximately 1:53 p.m. Thereafter, Peel and Bekker, in a City vehicle, followed me to my house. Adams arrived approximately ten minutes after Peel Bekker and myself. Peel and Bekker were parked alongside the curb in front of my house. Pursuant to the order, I then went into my house, retrieved my personal items, and placed them on my front lawn. Perched in the City vehicle, Peel and Bekker watched me and looked at the personal items laid out on my lawn. Peel and Bekker left shortly thereafter.

16. Chief Stephen Wells has been with the City Rialto for approximately thirty years and has been Chief for approximately seven years.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct.

Date: January 16, 2009 /s/ Nicholas Delia

NICHOLAS DELIA

REPLY
BRIEF

RECORD
AND
BRIEFS

No. 10-1018

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

In The
Supreme Court of the United States

◆

STEVE A. FILARSKY, ESQ.,

Petitioner,

v.

NICHOLAS B. DELIA,

Respondent.

◆

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

◆

REPLY BRIEF FOR STEVE A. FILARSKY, ESQ.

◆

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

This petition presents a compelling issue for certiorari: Whether petitioner Filarsky (Filarsky), a private lawyer, retained to work with government employees in conducting an internal affairs investigation, is precluded from asserting qualified immunity solely because of his status as a "private" lawyer, rather than a full time government employee. Recognizing the petition's strength, respondent (Delia) makes an eleventh hour attempt to re-characterize Filarsky's role as that of a "private investigator" instead of "private attorney." However, Delia's belated shift is totally foreclosed by the Ninth Circuit opinion and by the record.

Moreover, Delia cannot legitimately dispute that there is an express, direct circuit split on the very question presented. His attempt to argue that the Ninth Circuit decision does not contravene this Court's opinion in *Richardson v. McKnight,* 521 U.S. 339 (1997) also fails. Nor can Delia legitimately dispute that the question is a vitally important one given the prevalence of § 1983 actions and the importance of the issue to public entities – as evidenced by the filing of the brief of the *Amici Curiae* for the League of California Cities and the California State Association of Counties in support of the petition.

The petition should be granted because this case presents an ideal vehicle to determine that private attorneys hired by cities and counties enjoy qualified immunity.

I. DELIA'S ATTEMPT TO DODGE THE ISSUE PRESENTED BY BELATEDLY RECHARACTERIZING FILARSKY AS A "PRIVATE INVESTIGATOR" RATHER THAN A "PRIVATE ATTORNEY" IS FORECLOSED BY THE RECORD

Delia's sudden attempt to shift the issue from qualified immunity for a "private attorney" to qualified immunity for a "private investigator" contradicts his own previous arguments, the Ninth Circuit's express holding, and the underlying record.

First, Delia has contended all along since the district court level that Filarsky was acting in his capacity as a private *attorney* retained by the City, as evidenced by the Ninth Circuit's opinion. As that opinion plainly states "*Delia contends* that Filarsky, *as a private attorney*, is not entitled to qualified immunity." Pet. App. 24-25 (emphasis added).

Second, the Ninth Circuit's opinion describes Filarsky as " . . . a private attorney, who was retained by the City to participate in internal affairs investigations." Pet. App. 24-25. The Ninth Circuit opinion also states that "[t]he interview was conducted by Filarsky, *a private attorney* retained by the City." Pet. App. 6-7 (emphasis added). Moreover, the term used by the Ninth Circuit at Pet. App. pages 6-7 ("representing") is a term used to describe the function of an attorney, not an investigator; it is not being used for any other purpose than to describe the legal relationship between Filarsky and the City.[1] Even more important, the opinion specifically holds that "Filarsky is not entitled to qualified immunity *as a private attorney* and we reverse the district court's grant of summary judgment in his favor and remand for trial, or further proceedings as determined by the district court." Pet. App. 27 (emphasis added). There is therefore no merit whatsoever to Delia's attempt to reconstruct the Ninth Circuit's holding by stating the "error in Filarsky's argument is that the Ninth Circuit did not hold that private attorneys are never entitled to qualified immunity; but instead, that Filarsky as a private investigator conducting an internal affairs investigation, was not entitled to qualified immunity." Opp. 9. The petition presents the precise issue raised by the proceedings below – whether qualified immunity should extend to private attorneys who are not government employees but are hired to perform government functions alongside of government employees.

Third, the underlying record indisputably confirms that Filarsky was retained by the City of Rialto (City) to assist in conducting the investigation as *an*

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[1] *See also* Opp. 11, n.4, where Delia attempts to make the same argument regarding Filarsky's lack of representation as an attorney for the City; however, again Delia uses the word "represent," which denotes Filarsky's legal representation of the City in the setting of an internal affairs investigation.

attorney. It was only because of Filarsky's expertise *as an attorney* that he was employed by the City for more than a decade, "to participate in internal affairs investigations concerning personnel issues," to conduct interviews of City employees "in connection with the investigative process of the City's personnel/ internal affairs matters," and to provide legal advice to the City in connection with disciplinary proceedings. Pet. App. 88-89 ¶¶3-4; see also Pet. App. 44-45 ¶4 ("At the time of the interview, Filarsky had for a number of years been regularly representing the City and providing legal advice to it regarding labor and employment issues" and "had previously questioned Fire Department employees in internal affairs investigations."). In short, there is no confusion or debate as to the fact that Filarsky acted as an *attorney* on behalf of the City. Accordingly, Delia's surprise assertion that Filarsky is a "private investigator" and not a "private attorney" fails completely.

II. THERE IS AN EXPRESS AND DIRECT CIRCUIT SPLIT

Delia's attempts to dispute that there is a circuit conflict are absurd given that the Ninth Circuit *expressly* parts ways with the Sixth Circuit. Opp. 18, 19, 20, 21. The Ninth Circuit's opinion *acknowledges* (Pet. App. 25) its ruling conflicts with the Sixth Circuit's opinion in *Cullinan v. Abramson,* 123 F.3d 301, 310 (6th Cir. 1997), by stating it was unable to follow *Cullinan* because it was bound by the Ninth Circuit's own earlier, per curiam opinion in *Gonzalez* *v. Spencer*, 336 F.3d 832 (9th Cir. 2003). Pet. App. 25-26, citing *Gonzalez,* 336 F.3d at 834-35. Accordingly, the law of the Ninth Circuit as reaffirmed in this case, is *Gonzalez v. Spencer,* 336 F.3d 832 (9th Cir. 2003), which held that a private attorney representing a county was not entitled to qualified immunity without any analysis beyond the mere fact that the defendant attorney was a private party and not a government employee. *Id.* at 834-835. Pet. App. 25-26.

There is no merit to Delia's suggestion that Filarsky "attempt[s] to marry this case to" *Gonzalez.* It was *not* Filarsky that linked *Gonzalez* with this case; it was the Ninth Circuit itself that did so. The Ninth Circuit's opinion in this case unequivocally states that "the court is bound by *Gonzalez* 'unless an *en banc* decision, Supreme Court decision or subsequent legislation undermines'" it. Pet. App. 26. Accordingly, the law of the circuit as affirmed in this case is the ruling of *Gonzalez* that qualified immunity is not available to private attorneys. While Delia criticized "Filarsky's perception that the holdings of *Gonzalez* and *Cullinan* are incompatible" (Opp. 21), Delia ignores that the Ninth Circuit in this case declined to factually distinguish *Gonzalez* and *Cullinan* and chose instead to categorically part company with the Sixth Circuit, without so much as mention of the analysis mandated by this Court.

Further, even beyond this direct circuit conflict, Delia completely ignores the petition's showing of confusion in the lower courts on the availability of qualified immunity to private parties, which further warrants this Court's review. See Pet. at 34-35 (explaining that lower courts have varied widely in applying *Richardson* as a test and that this Court should grant certiorari to re-examine and clarify the *Richardson* factors and finally explain how they relate, how they are to be applied, and which are dispositive for extending the protection of qualified immunity to government retained *private* lawyers, as expressly left open in *Richardson*); see also *Developments in the Law: State Action and the Public Private Distinction: Private Party Immunity from § 1983 Suits*, 123 HARVARD LAW REVIEW 1266, 1271 (March 2010).

III. DELIA'S MERITS ARGUMENTS REGARDING ENTITLEMENT TO QUALIFIED IMMUNITY UNDER THE *RICHARDSON* MAJORITY AND DISSENT PROVIDE NO REASON TO DENY CERTIORARI

The important question for this Court is the same one decided by the Ninth Circuit: Whether Filarsky, retained as a private lawyer to work with government employees in conducting an internal affairs investigation, is precluded from asserting qualified immunity solely because of his status as a "private" lawyer rather than a government employee. In fact, this Court left open the opportunity of extending qualified immunity to private individuals, including by specific example lawyers, working "at the behest of the sovereign" when "special circumstances" were present. *Richardson v. McKnight*, 521 U.S. at 407, citing *Tower v. Glover*, 467 U.S. 914, 914-21 (1994), and J. Bishop, *Commentaries on Non-Contract Law* §§ 704, 710 (1889). This Court should therefore grant certiorari to decide this important question over which the lower courts are irreconcilably divided.

Most of Delia's argument regarding *Richardson* is premised – falsely – on his newly minted "private investigator" characterization of Filarsky's role. In apparent recognition that there is tremendous historical precedent for the extension of qualified immunity to lawyers, Delia employs the tactic of "reinventing" Filarsky as an investigator to divert attention from such precedent and to suggest there is no historical precedent for affording immunity to investigators and, therefore, the Ninth Circuit's opinion does not contravene the *Richardson* principles but rather is in accord with them. Opp. 2. But, the Ninth Circuit's holding directly forecloses Delia's "private investigator" characterization of Filarsky. See Pet. App. 6-7, and 24-25. Consequently, this shell game engaged in by respondent is factually inaccurate and is a false legal conclusion. Delia's contentions, premised on this false notion that we are not dealing with a private attorney hired "at the behest of the sovereign," fail under the test of the *Richardson* majority decision.

In any event, even under Delia's blatant mischaracterization of Filarsky as a "private investigator," Filarsky would still meet the *Richardson* majority's criteria that he be "briefly associated with a government body" (the City), acting "adjunct to government in an essential governmental activity" (conducting internal affairs investigations, which are prototypically government functions), and "acting under close official supervision." *Richardson*, at 413. As such, the Ninth Circuit's categorical rule contravenes the *Richardson* majority, which expressly did not preclude qualified immunity for an *individual* working with the government in an essential government activity, and under close supervision.

Moreover, Delia's attempt to rely on the *Richardson* majority rationale that competitive market forces would serve some of the same purposes that qualified immunity serves (Opp. 13) fails. As explained by the *Amici Curiae* brief, that rationale does not apply here:

> Unlike private prison companies, whose only potential clients are government units, private attorneys can take their business elsewhere – namely to private clients. Nor will mechanisms such as indemnity and insurance, *see id.* at 410-411, cure the problem. If private attorneys cannot avail themselves of qualified immunity, then the costs to indemnify and insure their services will increase and will ultimately be borne by the cities and government units that utilize their services. As Justice Scalia pointed out in *Richardson,* there is no "free lunch"; "as civil-rights claims increase, the cost of civil-rights insurance increases." *Id.* at 419 n.3 (Scalia, J., dissenting). *Amici Curiae* 16.

The Ninth Circuit's categorical rule as to private attorneys also contravenes the "functional approach" analysis discussed in the petition. Delia's argument that Filarsky's representation of the City in internal investigations should not be considered a "prototypically governmental function" makes no sense. Opp. 17. Internal affairs investigations are at their core solely government activities. Indeed, as pointed out in the petition, the Ninth Circuit found that, for the same acts (conducting an internal affairs investigation), those who had the power to issue the Order (the City) were qualifiedly immune but Filarsky was not. Pet. App. 4-5, 12-24. It is clear that policy rationales previously noted in *Richardson,* 521 U.S. at 417-18 (Scalia, J., dissenting) dictate that qualified immunity apply to private attorneys in these circumstances. The Ninth Circuit's opinion categorically takes away this protection for private attorneys working for public entities throughout the Ninth Circuit.

Finally, Delia attempts to bolster his position with irrelevant *absolute* immunity principles. Opp. 17, citing *Briscoe v. LaHue,* 460 U.S. 325, 335 (1983). While this Court has been "quite sparing" in recognizing *absolute* immunity, such as in *Burns v. Reed,* 500 U.S. at 478, 486 (1991), Filarsky has never contended that he is entitled to *absolute* immunity. Accordingly, Delia's arguments relating to Filarsky not completing a "quasi-judicial function" (Opp. 18) are irrelevant to the application of *qualified* immunity. *Burns,* 500 U.S. at 486.

IV. THIS CASE IS AN IDEAL VEHICLE FOR NOT ONLY RESOLVING THE CLEAR CIRCUIT SPLIT, BUT ALSO FOR CLARIFYING AN ISSUE OF VITAL IMPORTANCE FOR MUNICIPALITIES IN SEEKING LEGAL COUNSEL

The use of private attorneys as exemplified by the City's employment of Filarsky is a common and vital component of municipal, county, and other forms of local governance and even the federal government. *Amici Curiae* 10. There is no merit to Delia's argument that the "*amici curiae* brief only addresses the general argument, framed around hypothetical facts, that municipalities should be able to contract for legal services and that some of those legal service providers should be entitled to qualified immunity." Opp. 12. On the contrary, the *Amici Curiae* brief details the myriad of ways that *private* attorneys are, in fact, being used by public entities. *Amici Curiae* 6, 9. To that end, most counties bring in outside counsel for the *specific purpose of conducting personnel investigations,* as in this case. *Amici Curiae* 9. Even apart from the Circuit conflict, this is another ground warranting certiorari. Supreme Court Rule 10.

The importance of issues involving private party liability for alleged constitutional violations is further underscored by the recent grant of certiorari in *Minneci v. Pollard* (Case No. 10-1104) on the issue of whether the Court should imply a cause of action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against individual employees of private companies that contract with the federal government to provide prison services. In fact, the *Amici Curiae* brief in this case cites the underlying Ninth Circuit opinion in the *Minneci* case (*Pollard v. GEO Group, Inc.,* 629 F.3d 843 (9th Cir. 2010)) in making the point that the issue raised in this matter – whether qualified immunity extends to private attorneys who are not government employees but are hired to perform government functions alongside government employees – is important not only to local government entities but also potentially to federal government agencies, which also commonly utilize such private attorneys. See *Amici Curiae* 11, n.2.

A number of special reasons favor qualified immunity for attorneys, such as Filarsky, who are hired by city and county officials to work for and with them in *representing* cities and counties performing government functions, as demonstrated above. While Delia would have this Court believe that Filarsky's case is unique and does not present a compelling issue for review, the *Amici Curiae* brief demonstrates that this case presents an important issue that has a wide-impact on a variety of public entities across the United States.

V. CONCLUSION

This Court should grant certiorari, reverse the Ninth Circuit's judgment, and bring clarity once and for all to the application of qualified immunity to private attorneys, such as Filarsky, who act as adjuncts to government agencies.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

No. 10-1018

[illegible]

In The

Supreme Court of the United States

◆

STEVE A. FILARSKY,

Petitioner,

v.

NICHOLAS B. DELIA,

Respondent.

◆

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

◆

BRIEF OF *AMICI CURIAE* THE LEAGUE OF CALIFORNIA CITIES AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER STEVE A. FILARSKY

◆

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INTERESTS OF *AMICI CURIAE*[1]

The League of California Cities and the California State Association of Counties, as representatives of local government entities throughout California, have a vital interest in ensuring that cities and counties continue to have the ability to make effective and cost-efficient use of private attorneys in providing legal services and representation on behalf of the public. As explained in greater detail below, use of private attorneys on an ad hoc basis similar to the circumstances in this case is commonplace, desirable, and sometimes necessary—for smaller cities and counties in particular, but even for larger ones.

The League of California Cities (League) is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities and identifies those cases that are of statewide—or nationwide—significance. The Committee has identified this case as being of such significance.

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[1] Under Supreme Court Rule 37.2(a), counsel of record received timely notice of the intent of *amici curiae* to file this brief, the parties have consented to the filing of this brief, and their consents have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

The California State Association of Counties (CSAC) is a non-profit corporation with membership consisting of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsel's Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

◆

SUMMARY OF ARGUMENT

In this section 1983 action, the Ninth Circuit Court of Appeals' published opinion (Opinion) concludes that a city firefighter's Fourth Amendment rights were violated during an internal affairs investigation. Recognizing, however, that there was no clearly established authority that the investigating conduct would constitute a Fourth Amendment violation, the Opinion holds that all the individuals involved in conducting the investigation are entitled to qualified immunity—that is, all except one.

The one participant the Opinion concludes is not entitled to qualified immunity is a private attorney—petitioner Steve A. Filarsky—whom the City of Rialto employed to assist it in conducting the investigation. According to the Ninth Circuit panel, it was bound by earlier Ninth Circuit precedent holding that private attorneys hired by government agencies are not entitled to qualified immunity. (Appendix to Petition for a Writ of Certiorari of Steve A. Filarsky (Pet. App.) 25-26 (citing *Gonzalez v. Spencer*, 336 F.3d 832 (9th Cir. 2003) (per curiam)).)

Mr. Filarsky has petitioned for a writ of certiorari. The Court should grant his petition and hear this case for the following reasons:

- The availability of qualified immunity for private attorneys hired by cities is vitally important to municipalities, like the City of Rialto in this case, to other local government units, and even to the federal government agencies, which all commonly engage private attorneys in various capacities in an effort to obtain the most effective legal services and representation possible for the public in a fiscally responsible manner.

- Only two of this Court's opinions address the availability of qualified immunity to private parties: *Richardson v. McKnight*, 521 U.S. 399 (1997) and *Wyatt v. Cole*, 504 U.S. 158 (1992). Contrary to the Opinion's passing references to these decisions, they do not foreclose—but rather support—qualified immunity for private attorneys hired by municipalities.

- As the Ninth Circuit's opinion acknowledges (Pet. App. 25), its ruling conflicts with the Sixth Circuit's opinion in *Cullinan v. Abramson*, 128 F.3d 301, 310 (6th Cir. 1997) (relying on

Richardson). While the Ninth Circuit panel says that it is bound by the Ninth Circuit's earlier, per curiam opinion in *Gonzalez* (Pet. App. 25-26), the *Gonzalez* opinion offers virtually no analysis beyond the mere fact that the defendant attorney was a private party and not a government employee. *Gonzalez*, 336 F.3d at 835.

- Flatly denying qualified immunity to private attorneys—as the Ninth Circuit has done in *Gonzalez* and now this case—is not just legally wrong but will harm cities and other government units by making utilization of private attorneys less effective and more expensive. This, in turn, will force many cities and counties to forego the considerable advantages of using private attorneys or to pay considerably more to do so.

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ARGUMENT

THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE AN EXPLICIT CIRCUIT SPLIT AND CLARIFY THAT QUALIFIED IMMUNITY EXTENDS TO PRIVATE ATTORNEYS WHO ARE NOT GOVERNMENT EMPLOYEES BUT ARE HIRED TO PERFORM GOVERNMENT FUNCTIONS ALONGSIDE OF GOVERNMENT EMPLOYEES—AN ISSUE OF VITAL IMPORTANCE TO CITIES AND COUNTIES.

A. Cities, Counties, And Other Government Units Rely Heavily On Private Attorneys Such As Petitioner Filarsky For Representation And Advice In Performing Government Functions.

"In an era of ever-increasing fiscal consciousness brought on by financial constraints, local government agencies are constantly exploring methods of continuing to provide public services at their traditional level yet, at the same time, reducing if not stabilizing service costs." Philip D. Kahn, *Privatizing Municipal Legal Services*, 10 Local Government Studies, no. 3 (1984) at 1, *available at* http://www.informaworld.com/smpp/content~db=all~content=a789131048. Although this observation was made more than 25 years ago, it is even more apt in the dire financial circumstances most local government agencies face today. Today, just as then, one common means for cities and counties to meet their needs for legal services in a cost-effective and fiscally responsible manner is to hire private attorneys either to provide specific services on an ad hoc basis or to serve as city attorney or county counsel.

As in this case, cities frequently utilize private attorneys on an ad hoc basis for a variety of purposes, including "litigation matters, criminal prosecution, special appearances before other government agencies, extensive research projects, preparation of contracts and agreements other than those routinely used by the city in the ordinary course of business, and other projects of an unusual or time consuming nature." *Id.* at 3. And hundreds of cities in California contract out the position of city attorney to a private attorney or law firm. *See id.* at 2 (in 1984, "[i]nformation maintained by the League of California Cities indicate[d] that out of 435 member cities surveyed, 340 of them—approximately 78 per cent—ha[d] contract city attorneys").

Cities are not the only government units that frequently utilize private attorneys. Private attorneys are similarly hired by "other local government agencies such as water districts, school districts, redevelopment agencies, and counties." *Id.* at 2 & n.8. Federal government agencies too use private counsel on an ad hoc basis for litigation and various other purposes. *See* William V. Luneburg, *Contracting by the Federal Government for Legal Services: A Legal and Empirical Analysis*, 63 Notre Dame L. Rev. 399, 463 (1988) (surveying various federal departments and agencies and concluding that "legal work of all types, from the purely advisory to litigation, is contracted out").

"The first and most obvious potential advantage of outsourcing legal services is cost savings." Patrick McFadden, Note, *The First Thing We Do, Let's Outsource All the Lawyers: An Essay*, 33 Pub. Cont. L.J. 443, 444 (2004). "Although substantially similar from a functional stand-point, in-house and contract city attorneys differ primarily with regard to financial considerations." Kahn, *supra*, at 2. Using private attorneys rather than in-house staff provides substantial savings to government entities on myriad expenses, from employee benefits to law libraries to various administrative overhead costs. *Id.* "The economies associated with a contract city attorney are particularly evident in the case of cities whose legal needs are insufficient to warrant the fulltime permanent employment of one or more attorneys; however, even cities with substantial legal needs nonetheless still benefit from contracting out some or all city attorney services (and the attendant administrative overhead) to the private sector." *Id.*

Saving costs is not the only reason cities, counties, and other government units hire private attorneys. *See* McFadden, *supra*, at 453 (summarizing "the possible benefits of outsourcing legal work in terms of cost savings, improved service, and more pragmatic decision making"). "Value includes not only the absolute cost, but also the quality of service. At its most basic level, the decision to outsource government attorneys is not so different from the 'make-or-buy' decision that corporations face with respect to the size of their in-house legal departments." *Id.* at

444-45; *see also id.* at 445 & n.8 (noting, in context of private firm outsourcing of legal services, advantage of outside firms' exposure to new legal issues and developments).

Specifically, other pragmatic and beneficial reasons for cities to utilize private outside counsel include:

- limitations on in-house staff resources and time to do the necessary work—many smaller municipalities simply lack the legal staff to complete even relatively small tasks, and even larger municipalities may lack sufficient legal staff for especially large tasks, *see* Kahn, *supra*, at 2 (noting that some cities are so small that their legal needs do not warrant full-time employment of even one attorney); *see also* Luneburg, *supra*, at 405, 463 (noting these limitations in corporate context and that same considerations apply to federal agencies); *id.* at 459 (noting that "[t]he FDIC explains its use of private attorneys largely as a matter of lack of staff resources to handle the volume of work");

- to avoid actual or potential conflict-of-interest issues, *see, e.g.*, *Morongo Band of Mission Indians v. State Water Resources Control Bd.*, 45 Cal. 4th 731, 737-42, 88 Cal. Rptr. 3d 610, 199 P.3d 1142 (2009) (discussing conflict of interest issues arising where agency attorney acts as both advocate before and advisor to the agency); and, relatedly,

- "a particular need for 'independence' in the rendering of the opinion or as a check on an opinion

> rendered internally in an area where the inside lawyer may have less experience than outside counsel and some 'comfort' might be obtained by confirmation of the inside view," Luneburg, *supra*, at 405; *see also id.* at 463 (noting that this consideration, arising in corporate context, also applies to federal agencies).

These observations apply to counties and other government entities as well. The vast majority of California counties use private outside counsel in situations like the one in this case. In most counties, outside counsel is brought in for the investigation of high level personnel issues, where the facts are particularly complicated, or where there are conflicts of interest. Some counties bring in outside counsel routinely.

An especially prevalent reason for using private counsel is the need for specialized expertise that in-house attorneys for a city or other government unit—small or large—may lack. "Private attorneys with significant, specialized expertise in various sectors can provide improved service to government agencies." McFadden, *supra*, at 445; *see also* Luneburg, *supra*, at 405 (noting "lack of in-house expertise" as reason to outsource legal work); *see also id.* at 463 (noting that this consideration, arising in corporate context, also applies to federal agencies); *id.* at 459 (noting that the FSLIC's contracting is required for both lack of staff resources and need for expertise in areas of local law).

Indeed, this case well illustrates these concepts. The City of Rialto is a relatively small city that does not employ an in-house city attorney but hires outside counsel for that purpose. Additionally, like other cities small and large, the City of Rialto sometimes needs to hire private counsel on an ad hoc basis and to hire counsel with specialized knowledge in areas such as labor law. Mr. Filarsky, a private attorney, had served as an independent outside counsel for the City over a period of more than a decade, "to participate in internal affairs investigations concerning personnel issues," to conduct interviews of City employees "in connection with the investigative process of the City's personnel/internal affairs matters," and to provide legal advice to the City in connection with disciplinary proceedings. (Pet. App. 88-89, ¶¶ 3-4; *see also* Pet. App. 6-7 ("Filarsky had previously represented the City in conducting interviews during internal affairs investigations."); Pet. App. 44-45, ¶ 4 ("At the time of the interview, Filarsky had for a number of years been regularly representing the City and providing legal advice to it regarding labor and employment issues" and "had previously questioned Fire Department employees in internal affairs investigations.").)

In short, use of private attorneys—as exemplified by the City of Rialto's employment of Mr. Filarsky—is a common and vital component of municipal, county, and other forms of local governance and even the federal government. Given the prevalence of section 1983 actions, the issue of whether private attorneys hired by cities and counties enjoy qualified immunity has the potential to significantly impact each of the League's 474 members and CSAC's 58 members—not to mention cities, counties and other local government units nationwide—and even federal government agencies in the context of *Bivens* actions.[2]

B. This Case Can Resolve A Circuit Split And Clarify That Private Attorneys Such As Mr. Filarsky—Who Are Hired By And Work With City And County Officials To Represent And Advise Cities And Counties And Perform Government Functions—Are Entitled To Qualified Immunity Even Though They Are Not Public Employees.

In this case, the Ninth Circuit panel determined that it was bound by the circuit's earlier, per curiam opinion in *Gonzalez*, which held that a private attorney representing the County of Los Angeles was not entitled to qualified immunity. (Pet. App. 25-26, citing

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[2] *See Anderson v. Creighton*, 483 U.S. 635, 637 (1987) (discussing qualified immunity of federal agents in context of Fourth Amendment action for money damages under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)); *see also Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 65 (2001) (leaving open question "whether a *Bivens* action might lie against a private individual"); *Pollard v. GEO Group, Inc.*, 629 F.3d 843, 846 (9th Cir. 2010) (explaining that panel majority "grants a *Bivens* claim to a prisoner against private company prison guards who are unprotected by notions of qualified immunity, available only to government employees") (Bea, J., dissenting from denial of rehearing en banc) (footnote omitted).

Gonzalez, 336 F.3d at 834-35.) The entire reasoning of *Gonzalez* for rejecting the private attorney's claim of qualified immunity was that (1) she was "a private party, not a government employee," and (2) she pointed to "'no special reasons significantly favoring an extension of governmental immunity' to private parties in her position." 336 F.3d at 835 (quoting *Richardson*, 521 U.S. at 412). However, the result in *Gonzalez*, and now this case, contravenes this Court's two opinions that address qualified immunity of private parties—*Wyatt* and *Richardson*.

First, neither *Wyatt* nor *Richardson* can be read to categorically preclude qualified immunity to private parties. Though *Wyatt* declined to afford qualified immunity to private party defendants, its holding was "precise[ly]" limited to parties "invoking a state replevin, garnishment, or attachment statute," 504 U.S. at 168-69, thus leaving open whether qualified immunity might be available to private parties who performed government functions. And while *Richardson* declined to provide qualified immunity to prison guards in a private prison setting, it expressly "answered the immunity question narrowly, in the context in which it arose," i.e., "one in which a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertakes that task for profit and potentially in competition with other firms." 521 U.S. at 413.

Richardson, in fact, points to allowing qualified immunity here. It distinguished "lawyers who performed services at the behest of the sovereign," *id.* at 407, and emphasized that the case did "not involve a private individual briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision." *Id.* at 413. That description fits Mr. Filarsky's role in this case to a tee. As the Opinion states, he "is a private attorney, who was retained by the City to participate in internal affairs investigations." (Pet. App. 24.) The opinion also describes Mr. Filarsky conducting the internal affairs interview in the presence of two fire battalion chiefs, and conferring with the fire chief during a break in the interview. (Pet. App. 6-8.) Mr. Filarsky, like many private attorneys retained on an ad hoc basis by cities, was not performing anything like the kind of long-term, largely autonomous administrative function addressed in *Richardson*.

As *Richardson* explained, the Supreme Court "look[s] both to history and to the 'special policy concerns involved in suing government officials'" in determining whether private defendants enjoy immunity. 521 U.S. at 404 (quoting *Wyatt*, 504 U.S. at 167.) In terms of history regarding private attorneys, *Richardson* points out that "[a]pparently the law *did* provide a kind of immunity for certain private defendants, such as doctors or lawyers who performed at the behest of the sovereign." 521 U.S. at 407. And as the Opinion in this case acknowledges, the Sixth

Circuit relied in part on this point to conclude that a private attorney hired by a municipality was entitled to qualified immunity. (Pet. App. 25, citing *Cullinan*, 128 F.3d at 310; *see also Cooper v. Parrish*, 203 F.3d 937, 952 (6th Cir. 2000) (declining to extend qualified immunity to private attorney prosecuting nuisance abatement actions and distinguishing *Cullinan* on grounds that attorney was not acting at behest of the state and not paid by the state for his services).) While the Opinion dismisses this point as just dictum in *Richardson* (Pet. App. 25), the point is actually part of the *Richardson* majority's express, reasoned limitations on its holding.

More important, this Court has "never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law." *Anderson*, 483 U.S. at 645. What is most significant is that the key policy concerns identified by this Court favor granting, not denying, qualified immunity here. As *Richardson* recaps, qualified immunity serves the purposes of:

- "protecting government's ability to perform its traditional functions by providing immunity where necessary to preserve the ability of government officials to serve the public good or to ensure that talented candidates [are] not deterred by the threat of damages suits from entering public service";

- protecting the public from unwarranted timidity on the part of public officials by, for example, encouraging the vigorous exercise of official authority"; and

- "by contributing to principled and fearless decision-making." 521 U.S. at 408 (internal quotation marks and citations omitted).

These purposes are all thwarted by denying qualified immunity to private attorneys who are hired by government officials to represent, advise, and work with government entities on matters of governance and who effectively perform government functions. Denying qualified immunity likely will make some talented private attorneys stop performing services for cities, counties, and other government units. The public benefits from cities and counties utilizing talented attorneys with special expertise, but denying them qualified immunity solely because they are private will discourage them from doing so.

Private lawyers who do continue to perform services for cities and other government units will likely exhibit "unwarranted timidity" in government decision making, one of the very pitfalls that qualified immunity is intended to prevent. *Id.* at 408; *see also DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 723 (10th Cir. 1988) ("[D]enying immunity would make contractor defendants—whether individual or corporate—more timid in carrying out their duties and less likely to undertake government service."). And, inevitably, the cost of hiring private lawyers will increase if they are categorically disqualified from receiving qualified immunity in section 1983 lawsuits, which directly implicates cities' and other government units' abilities to cost-effectively "serve the public good." *Richardson*, 521 U.S. at 408.

While the majority opinion in *Richardson* opined that competitive market forces would serve some of the same purposes that qualified immunity serves, *id.* at 409, that rationale does not apply here. Unlike private prison companies, whose only potential clients are government units, private attorneys can take their business elsewhere—namely to private clients. Nor will mechanisms such as indemnity and insurance, *see id.* at 410-11, cure the problem. If private attorneys cannot avail themselves of qualified immunity, then the costs to indemnify and insure their services will increase and will ultimately be borne by the cities and government units that utilize their services. As Justice Scalia pointed out in *Richardson*, there is no "free lunch"; "as civil-rights claims increase, the cost of civil-rights insurance increases." *Id.* at 419 n.3 (Scalia, J., dissenting).

As the Opinion here acknowledges, the Sixth Circuit in *Cullinan* "s[aw] no good reason to hold the city's in-house counsel eligible for qualified immunity and not the city's outside counsel." (Pet. App. 25, quoting *Cullinan*, 128 F.3d at 310.) As the Opinion here fails to acknowledge, *Cullinan*'s observation applies equally here.

In sum, more than ample special reasons favor immunity for attorneys, such as Mr. Filarsky, who are hired by city and county officials to work for and with them in representing cities and counties and performing government functions, as demonstrated above. Therefore, this Court should grant certiorari and clarify this area of the law. As we now explain, failure to do so will harm cities, counties, and other government units that utilize private attorneys.

C. Failing To Accord Qualified Immunity To Private Attorneys Hired By Cities, Counties, And Other Government Units Will Hamper Their Abilities To Obtain High-Quality And Cost-Effective Legal Services.

As established above, many smaller cities and counties do not have sufficient legal needs or cannot afford to employ in-house attorneys, and even larger ones may not be able to afford sufficient in-house legal staff to handle all their legal needs. Moreover, cities and counties of all sizes sometimes require attorneys with specialized skills. The unavailability of qualified immunity to private attorneys will inhibit zealous representation by private attorneys and thereby force these cities and counties to forego the vigorous advocacy that could be provided by attorneys to whom qualified immunity is available.

Moreover, if private attorneys who presently work for cities and counties decide to opt out of such service altogether, this will hamper the ability of small cities and counties, and even larger ones, to obtain the services of talented lawyers with needed expertise in areas of municipal and county governance.

And as the fees charged by experienced private attorneys who continue to provide services to cities and counties go up—due to the increased costs that will inevitably follow from the lack of qualified immunity—all cities and counties will be adversely affected. Smaller cities and counties with little or no in-house legal staff will have to pay more for private attorneys or bear the financial burden of hiring in-house counsel. Larger cities and counties that have significant in-house counsel staff will pay more when the need arises for attorneys with specialized expertise or else bear the financial burden of obtaining and maintaining in-house counsel with such expertise. And, while less qualified, less experienced, and less talented private attorneys may step forward to offer their services at cheaper rates, cities and counties will then be getting less value for the money spent on private attorneys.

In short, denying qualified immunity will cost cities and counties substantially in terms of both the value and costs of legal services. These negative consequences are not even remotely required by this Court's authority; on the contrary, *Richardson* paves the way for this Court to clarify that qualified immunity is available to private attorneys, such as Mr. Filarsky, who act as adjuncts to government agencies.

◆

CONCLUSION

For the foregoing reasons, *amici curiae* the League of California Cities and the California State Association of Counties support the Petition for a Writ of Certiorari of Steve A. Filarsky.

Respectfully submitted,

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March 2011

JOINT APPENDIX

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No. 10-1018

In The
Supreme Court of the United States

STEVE A. FILARSKY,
Petitioner,

v.

NICHOLAS B. DELIA,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

United States District Court
Central District of California
(Western Division – Los Angeles)
Case No. 2:08-cv-03359-R-PLA

Nichols B. Delia v. City of Rialto, et al.

Date Filed:	No.	Docket Text
5/21/2008	1	COMPLAINT against Defendants Frank Bekker (as a Battalion Chief for the City of Rialto), Steve A. Filarsky (Individually), Steve A. Filarsky (as an Internal Affairs Investigator for the City of Rialto), DOES 1 through 10 Inclusive, City of Rialto, City of Rialto Fire Department, Stephen C. Wells, (Individually, Stephen C. Wells (as the Fire Chief for the City of Rialto), Mike Peel (Individually), Mike Peel (and as Battalion Chief for the City of Rialto), Frank Bekker (Individually). (Filing fee $350 PAID.) Jury Demanded., filed by Plaintiff Nicholas B. Delia. (et) (ds). (Entered: 05/28/2008) * * *
07/11/2008	16	ANSWER filed by Defendants Frank Bekker (as a Battalion Chief for the City of Rialto), City

		of Rialto, City of Rialto Fire Department, Stephen C. Wells (Individually), Stephen C. Wells (as the Fire Chief for the City of Rialto), Mike Peel (Individually), Mike Peel (and as Battalion Chief for the City of Rialto), Frank Bekker (Individually).(Golds, Howard) (Entered: 07/11/2008)
		* * *
07/29/2008	21	AMENDED ANSWER TO PLAINTIFF'S COMPLAINT filed by Defendants Frank Bekker (as a Battalion Chief for the City of Rialto), City of Rialto, City of Rialto Fire Department, Stephen C. Wells (Individually), Stephen C. Wells (as the Fire Chief for the City of Rialto), Mike Peel (Individually), Mike Peel (and as Battalion Chief for the City of Rialto), Frank Bekker (Individually). (Golds, Howard) (Entered: 07/29/2008)
		* * *
08/19/2008	24	JOINT REPORT Rule 26(f) Discovery Plan; estimated length of trial 2 days, filed by Plaintiff Nicholas B. Delia. (McGill, Michael) (Entered: 08/19/2008)
		* * *
10/22/2008	26	ANSWER AND AFFIRMATIVE DEFENSES BY DEFENDANT STEVE A. FILARSKY TO

		PLAINTIFF'S COMPLAINT filed Defendant Steve A. Filarsky (Individually). (Jackson, Jennifer) (Entered: 10/22/2008)

* * *

01/12/2009	33	NOTICE OF MOTION AND MOTION for Summary as to Entire Complaint filed by Defendants Frank Bekker (as a Battalion Chief for the City of Rialto), City of Rialto, Stephen C. Wells (Individually), Stephen C. Wells (as the Fire Chief for the City of Rialto), Mile Peel (Individually), Mike Peel (and as Battalion Chief for the City of Rialto), Frank Bekker (Individually). Motion set for hearing on 2/2/2009 at 10:00 AM before Judge Manuel L. Real. (Attachments: #1 Memorandum of Points and Authorities in Support of Motion for Summary Judgment or in the Alternative, Partial Summary Judgment, # 2 Declaration of Frank Bekker in Support of Motion for Summary Judgment or in the Alternative, Partial Summary Judgment, #3 Declaration of Mike Peel in Support of Motion for Summary Judgment or in the Alternative Partial Summary Judgment, #4 Declaration of Stephen C. Wells in Support of Motion for Summary

		Judgment or in the Alternative, Partial Summary Judgment, #5 Declaration of Howard B. Golds in Support of Motion for Summary Judgment or in the Alternative, Partial Summary Judgment, #6 Request for Judicial Notice in Support of Motion for Summary Judgment or in the Alternative, Partial Summary Judgment, #7 Proposed Statement of Uncontroverted Facts and Conclusions of Law in Support of Motion for Summary Judgment or in the Alternative, Partial Summary Judgment, #8 Proposed Judgment) (Golds, Howard) (Entered: 01/12/2009)
01/12/2009	34	NOTICE OF MOTION AND MOTION for Summary Judgment as to Plaintiff's Complaint filed by DEFENDANT Steve A. Filarsky (Individually). Motion set for hearing on 2/2/2009 at 10:00 AM before Judge Manuel L. Real. (Attachments: #1 Declaration of Steve A. Filarsky In Support of Motion for Summary Judgment, #2 Declaration of Jon H. Tisdale in Support of Motion For Summary Judgment, #3 Declaration of Jon H. Tisdale In Support of Motion for Summary Judgment, #4 STATEMENT OF

		UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW, #5 Proposed Order ORDER GRANTING DEFENDANT STEVE A. FILARSKY'S MOTION FOR SUMMARY JUDGMENT) (West, Jennifer) (Entered: 01/12/2009)

* * *

01/19/2009	36	OPPOSITION to MOTION for Summary Judgment as to Plaintiff's Complaint 34 filed by Plaintiff Nicholas B. Delia. (Attachments: #1 Plaintiff's Statement of Uncontroverted Facts, #2 Declaration of Nicholas Delia, #3 Declaration of Sanjay Bansal) (McGill, Michael) (Entered: 01/19/2009)
01/19/2009	37	OPPOSITION to MOTION for Summary Judgment as to Entire Complaint 33 filed by Plaintiff Nicholas B. Delia. (Attachments: #1 Statement of Uncontroverted Facts, #2 Declaration of Nicholas Delia, #3 Declaration of Sanjay Bansal) (McGill, Michael) (Entered: 01/19/2009)
01/20/2009	38	NOTICE OF MOTION AND MOTION for Partial Summary Judgment as to Issues of Liability filed by Plaintiff Nicholas B. Delia. Motion set for hearing on

		2/17/2009 at 10:00 AM before Judge Manuel L. Real. (Attachments: #1 Memorandum Points and Authorities in Support of Motion, #2 Proposed Statement of Uncontroverted Facts and Conclusions of Law, #3 Declaration of Nicholas Delia, #4 Declaration of Sanjay Bansal, #5 Proposed Order Granting Motion for Partial Summary Judgment and/or Summary Adjudication of Issues)(McGill, Michael) (Entered: 01/20/2009)
		* * *
01/23/2009	40	REPLY MOTION for Summary Judgment as to Plaintiff's Complaint 34 *Reply* filed by Defendant Steve A. Filarsky. (Attachments: #1 Declaration of Jon H. Tisdale in support of Reply of Defendant Steve A. Filarsky to Plaintiff's Opposition to Defendants MSJ, #2 Objections of Steve A. Filarsky to Evidence Submitted by Plaintiff in Support of MSJ (West, Jennifer) (Entered: 01/23/209)
		* * *
01/26/2009	42	REPLY Memorandum of Points and Authorities in Support of MOTION for Summary Judgment as to Entire Complaint 33 filed by Defendants Frank Bekker, City of Rialto, Stephen C. Wells, Stephen

		C. Wells, Mike Peel, Mike Peel, Frank Bekker. (Golds, Howard) (Entered: 01/26/2009)
02/02/2009	43	MINUTES OF Motion Hearing held before Judge Manuel L. Real: RE Defendants City of Rialto et al's Motion for Summary Judgment; or, for partial summary judgment 33 and Defendant Filarsky's Motion for Summary Judgment 34; Court GRANTS both motions for summary judgment 33, 34. Counsel for defendants shall prepare the Statement of Uncontroverted Facts and the Judgments. Plaintiff's Motion for Partial Summary Judgment 38 is hereby taken OFF calendar as MOOT. Court Reporter: Bridget Montero. (lc) (Entered: 02/06/2009)
		* * *
03/09/2009	47	STAT[E]MENT OF UNCONTROVERTED FACTS signed by Judge Manuel L. Real. (pj) (Entered: 03/09/2009)
03/09/2009	48	JUDGMENT by Judge Manuel L. Real, in favor of City of Rialto Fire Department, Frank Bekker, Mike Peel, Stephen C. Wells, Steve A. Filarsky against Nicholas. IT IS HEREBY

		ORDERED, ADJUDGED AND DECREED that Judgment in the above-captioned matter be, and hereby is, entered in favor of Defendants City of Rialto, Stephen Wells, Mike Peel, Frank Bekker and Steve Filarsky and that plaintiff Nicholas Delia shall take nothing by way of his Complaint. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants shall recover their costs of suit herein. B. Delia (MD JS-6, Case Terminated). (pj) (Entered: 03/09/2009)
		* * *
04/03/2009	56	NOTICE OF APPEAL to the 9th CCA filed by Plaintiff Nicholas B. Delia. Appeal of Judgment,, 48. (Filing fee $455, receipt number 0973000000005128387.) (McGill, Michael) (Entered: 04/03/2009)
		* * *
04/03/2009	59	TRANSCRIPT for proceedings held on 2-2-09 11:04 a.m. Court Reporter/Electronic Court Recorder: Bridget Montero, phone number www.bridgetmontero.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Electronic Court Recorder before the deadline for

		Release of Transcript Restriction. After that date it may be obtained through PACER. Notice of Intent to Redact due within 7 days of this date. Redaction Request due 4/24/2009. Redacted Transcript Deadline set for 5/4/2009. Release of Transcript Restriction set for 7/2/2009. (Montero, Bridget) (Entered: 04/03/2009)
		* * *
05/06/2009	64	CERTIFICATE OF RECORD Transmitted to USCA re Notice of Appeal *to* 9th Circuit Court of Appeals 56 filed by Nicholas B. Delia; Court of Appeals Case Number: 09-55514. (dmap) (Entered: 05/06/2009)
		* * *
11/05/2010	66	ORDER from 9th CCA filed re: Notice of Appear to 9th Circuit Court of Appeals 56 filed by Nicholas B. Delia, CCA # 09-55514. The panel has voted to deny the Petition for Panel Rehearing. Judge Rawlinson voted, and Judges Goodwin and Bennett recommend, to deny the Petition for Rehearing En Banc. The full court has been advised of the Petition for Rehearing En Banc, and no judge of the court has requested a vote. The Petition for Panel Rehearing and Rehearing En Banc of Appellant

		Nicholas B. Delia filed on October 12, 2010, is DENIED. Order received in this district on 11/05/2010. (lr) (Entered: 11/05/2010)
11/18/2010	67	ORDER from 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals 56 filed by Nicholas B. Delia CCA # 09-55514. is Appellee's Motion to Stay Issuance of the Mandate pending the Filing an[d] Disposition of a Petition for Writ of Certiorari is granted. The Clerk of the Court shall stay the issuance of the mandate until February 11, 2011. (dmap) (Entered: 11/19/2010)

RELEVANT DOCKET ENTRIES

United States Court of Appeals
for the Ninth Circuit
Case No. 09-55514

Nichols B. Delia v. City of Rialto, et al.

Date Filed:	No.	Docket Text
04/06/09	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND CADS: No. The schedule is set as follows: Designation of RT for Appellant Nicholas B. Delia due 04/13/2009. Designation of RT for Appellees Frank Bekker, City of Rialto, City of Rialto Fire Department, Steve A. Filarsky, Mike Peel and Stephen C. Wells due 04/23/2009. Transcript order for Appellant Nicholas B. Delia due 05/04/2009. Transcript due for Court Reporter Theresa Lynn Doty on 08/03/2009. Certificate of record due 08/10/2009. Appellant's opening brief due 09/18/2009. Appellees' answering brief due 10/19/2009. Appellant's optional reply brief is due 14 days after service of the answering brief. (JN)
		* * *
05/06/2009	6	Filed certificate of record on appeal. RT filed in DC 4/3/09 (EL)

		* * *
10/20/2009	12	Filed Appellant Nicholas B. Delia excerpts of record in 3 volumes. Served on 10/19/2009. [7100499] (WP)
10/26/2009	13	Filed original and copies of Appellant Nicholas B. Delia (Informal: No) opening brief pages. Served on. [7107581] (WP)
		* * *
11/18/2009	16	Submitted (ECF) Answering brief for review. Submitted by Appellees Frank Bekker, City of Rialto, City of Rialto Fire Department, Mike Peel and Stephen C. Wells. Date of service: 11/18/2009. [7134989]—COURT UPDATE: Replaced document with searchable version. 11/20/2009 by MA] (HBG)
11/18/2009	17	Submitted (ECF Answering brief for review. Submitted by Appellee Steve A. Filarsky. Date of service: 11/18/2009. [7135259]—[COURT UPDATE: Replaced main document with searchable version, 11/20/2009 by AWM] (JHT)
11/19/2009	18	Filed Appellee Steve A. Filarsky excerpts of record in 1 volume.

		Served on 11/18/2009. [7137551] (WP)
11/24/2009	19	Filed clerk order: answering brief [17] filed by Steve A. Filarsky in 09-55514. Within 5 working days of the filing of this order, filer is ordered to file 10 copies of the brief in paper format, with a red cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. [7142396] (FT)
11/24/2009	20	Filed clerk order: answering brief [16] filed by City of Rialto, City of Rialto Fire Department, Stephen C. Wells, Mike Peel and Frank Bekker in 09-55514. Within 5 working days of the filing of this order, filer is ordered to file 10 copies of the brief in paper format, with a red cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. [7142409] (FT)
		* * *
01/04/2010	28	Submitted (ECF) Reply brief for review. Submitted by Appellant Nicholas B. Delia. Date of service: 12/28/2009. [7181554] (MAM)

01/06/2010	29	Filed clerk order: The reply brief [28] submitted by Nicholas B. Delia is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, with a grey cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. [7185218] (WP)
		* * *
06/11/2010	32	ARGUED AND SUBMITTED TO ALFRED T. GOODWIN, JOHNNIE B. RAWLINGSON and MARK W. BENNETT. [7379182] (LN)
09/09/2010	33	FILED OPINION (ALFRED T. GOODWIN, JOHNNIE B. RAWLINSON and MARK W. BENNETT) AFFIRMED IN PART; REVERSED IN PART; REMANDED. Each party shall bear its own costs on appeal. Judge: MWB Authoring. FILED AND ENTERED JUDGMENT. [7467621] (RP)
		* * *
10/08/2010	36	Filed (ECF) Appellee Steve A. Filarsky petition for rehearing en banc (from 09/092010 opinion). Date of service: 10/08/2010. [7502640—[COURT UPDATE:

		Replaced PDF of petition with searchable amended version listing correct appellee, resent NDA, 10/12/2010 by AWM] (JHT)
		* * *
10/12/2010	38	Filed (ECF) Appellant Nicholas B. Delia petition for panel rehearing and petition for rehearing en banc (from 09/09/2010 opinion). Date of service: 10/08/2010. [7504542] (MAM)
10/15/2010	39	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by The League of California Cities. Date of Service: 10/15/2010. [7510610] (KJB)
		* * *
10/18/2010	41	Filed clerk order:RR: The amicus brief [39] submitted by The League of California Cities is filed. No paper copies of this brief are required. [7511898] [7511898] (RR)
11/05/2010	42	Filed order (ALFRED T. GOODWIN, JOHNNIE B. RAWLINSON and MARK W. BENNETT): The Petition for Panel Rehearing and Rehearing En Banc of Appellant Nicholas B. Delia filed on October 12, 2010, is DENIED. [7535975] (AF)

11/08/2010	43	Filed order (ALFRED T. GOODWIN, JOHNNIE B. RAWLINSON and MARK W. BENNETT) Amending Disposition Opinion The opinion filed September 9, 2010, is amended as follows: Slip Opinion page 13785, first full paragraph, lines 7-8 — replace "knew they could not directly do without clearly violating the Fourth Amendment" with "declined to do directly." With that amendment, Judge Rawlinson voted, and Judges Goodwin and Bennett recommended, to deny the Petition for Rehearing En Banc. The full court has been advised of the Petition for Rehearing En Banc, and no judge of the court has requested a vote. Appellee Steve A. Filarsky's Petition for Rehearing En Banc filed on October 8, 2010, is DENIED. Future petitions for rehearing and rehearing en banc will not be entertained. (See Order for full text) [7537766] (PH)
11/12/2010	44	Filed (ECF) Appellee Steve A. Filarsky Motion to stay the mandate. Date of service: 11/12/2010. [7543359] (JHT)

11/18/2010	45	Filed order (ALFRED T. GOODWIN, JOHNNIE B. RAWLINGSON and MARK W. BENNETT): Appellee's Motion to St ay Issuance of the Mandate Pending the Filing and Disposition of a Petition for Writ of Ceriorari is GRANTED. The Clerk of the Court shall stay the issuance of the mandate until February 11, 2011. [7550804] (AF)
02/14/2011	46	Received notice from the Supreme Court: petition for certiorari filed on 02/03/2011 and placed on the docket 02/10/11. Supreme Court Number 10-1018. [7648301] (RR)
09/27/2011	47	Received notice from the Supreme Court. Petition for certiorari GRANTED on 09/27/2011. Supreme Court Number 10-1018. [7908132] (RR)

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Attorneys for Plaintiff
NICHOLAS B. DELIA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA -
WESTERN DIVISION

NICHOLAS B. DELIA,

Plaintiff,

v.

CITY OF RIALTO, A Public Entity; CITY OF RIALTO FIRE DEPARTMENT A Public Agency; STEPHEN C. WELLS, Individually and as the Fire Chief for the City of Rialto; MIKE PEEL, Individually and as a Battalion Chief for the City of Rialto, FRANK BEKKER, Individually and as a Battalion Chief for the City of Rialto; STEVE A. FILARSKY, Individually

CASE NO. CV 08-03359 R (PLAx)

COMPLAINT FOR DAMAGES FOR VIOLATION OF INDIVIDUAL CIVIL RIGHTS AND LIBERTIES

DEMAND FOR JURY TRIAL

and as an Internal Affairs
Investigator for the City of
Rialto; and DOES 1
THROUGH 10
INCLUSIVE;
Defendants.

I.

PREFATORY

1. This is a complaint for damages for violations of an individual's constitutional rights to be free from unreasonable searches and seizures under the Fourth and Fourteenth Amendments to the United States Constitution, as well as the right to be free from invasions of privacy under the First, Fifth and Fourteenth Amendments to the United States Constitution. Plaintiff, a firefighter employed by the City of Rialto, was compelled under threat of insubordination, to enter his own home and produce personal, private property to City officials. These actions constitute gross violations of clearly established constitutional rights. As such, Plaintiff has brought suit under 42 U.S.C. Section 1983, seeking damages for said actions.

II.

JURISDICTION AND VENUE

2. Plaintiff's action is authorized by 42 U.S.C. § 1983, which provides for redress for the deprivation under color of state law of rights secured by the Constitution and the laws of the United States. Jurisdiction is conferred on this Court by 28 U.S.C. §

1343(3), providing for jurisdiction in this Court of suits authorized by 42 U.S.C. § 1983 to redress the deprivation under color of state law of any right, privilege, or immunity secured by the Constitution of the United States, and by 28 U.S.C. § 1343(4), providing for the protection of civil rights. This Court has authority to provide declaratory and injunctive relief in this case pursuant to 28 U.S.C. §§ 2201 and 2202. Venue is proper in the Central District of California in that the wrongs alleged herein occurred within the City of Rialto, within the Central District.

III.

PARTIES

3. Plaintiff NICHOLAS B. Delia ("Delia" or "Plaintiff") is an employee of the City of Rialto. At all times relevant to the allegations contained herein, Delia has been a resident of San Bernardino County.

4. Defendant City of Rialto ("Rialto" or "City"), is a public municipality organized under the laws of the State of California, situated in the County of San Bernardino. At all times relevant herein, and for all purposes connected with the management of employment relations, including the employment matters at issue with Delia, Rialto delegated its final policy-making authority to Defendants Wells, Peel, Bekker, and Filarsky. Rialto adopted and ratified each of the decisions of these individuals as alleged herein as its own policies, customs, practices or decisions, as if the same had been promulgated directly by Rialto. Alternatively, and based upon information and belief, the unlawful decisions hereafter described were taken by other unidentified

individuals who also have been delegated final policy-making authority. Defendant Rialto Fire Department is a public agency.

5. Defendant STEPHEN C. WELLS ("Wells") was at all times relevant, as he is now, the Fire Chief for the City of Rialto. Wells is sued only in his individual capacity. In doing the things alleged herein, Wells acted under color of state law, within the course and scope of his employment, and as an official policy-maker for the City. As a department head, and the city's top fire official, Wells is vested with policy-making authority over actions such as the ones at issue in this complaint. Defendant MIKE PEEL ("Peel") was at all times relevant, as he is now, a Battalion Chief for the City of Rialto. Peel is sued only in his individual capacity. In doing the things alleged herein, Peel acted under color of state law, within the course and scope of his employment, and as an official policy-maker for the City. Defendant FRANK BEKKER ("Bekker") was at all times relevant, as he is now, a Battalion Chief for the City of Rialto Bekker is sued only in his individual capacity. In doing the things alleged herein, Bekker acted under color of state law, within the course and scope of his employment, and as an official policy-maker for the City. Defendant STEVE A. FILARSKY ("Filarsky") was at all times relevant, an employee of the City of Rialto charged with conducting internal investigations. Filarsky is sued only in his individual capacity. In doing the things alleged herein, Filarsky acted under color of state law, within the course and scope of his employment, and as an official policy-maker for the City.

6. Defendant DOES 1 THROUGH 10 are not known or identified at this time. On information and belief, Plaintiff alleges that each DOE is in some manner responsible for the wrongs alleged herein, and that each such Defendant advised, encouraged, participated in, ratified, directed, or conspired to do, the wrongful acts alleged herein. When the true names and capacities of said Defendants become known, Plaintiff will seek relief to amend this Complaint to show their true identities in place of their fictitious names as DOES 1 THROUGH 10.

7. Defendants, and each of them, were the agent, employees and servants of every other Defendant. Defendants acted in the course and scope of said 11 agency, service and employment at all relevant times.

IV.

FACTS COMMON TO ALL COUNTS

8. Plaintiff hereby incorporates each and every preceding paragraph as though it were set forth in full.

9. In or about September 2006, Plaintiff was compelled by Defendants, under threat of insubordination and termination, to go to his home and produce certain private, personal property for production to Defendants. Defendants forced Plaintiff to remove his personal property from his residence and produce it so that it could be photographed by Defendants. At no time did these Defendants have any lawful basis to conduct said search and invade Plaintiff's privacy. Defendants Filarsky, Peel, Bekker

and. Wells gave the unlawful order, and as such violated Plaintiff's constitutional rights.

V.

COUNT ONE

42 U.S.C. §1983 - (Against All Defendants)

10. Plaintiff hereby incorporates each and every preceding paragraph as though it were set forth in full.

11. Defendants' actions violated Plaintiff's constitutionally protected rights to be free from unreasonable searches and seizures, as well as his constitutionally protected right to be from invasions of privacy.

12. By compelling Plaintiff to produce his personal, private property under threat of insubordination and termination, without a search warrant, without probable cause, nor pursuant to a lawful arrest, without consent, and otherwise without any lawful justification, these Defendants violated Plaintiffs Fourth and Fourteenth Amendment protections against unreasonable searches and seizures.

13. The First, Third, Fourth, Ninth and Fourteenth Amendments to the United States Constitution carry an implicit "privacy" right, and consequently "zones of privacy" which emanate to individuals under certain circumstances. By compelling Plaintiff to produce his personal, private property under threat of insubordination and

termination, these Defendants invaded a legally protected zone of privacy and lacked any legitimate interest and their actions were not narrowly tailored to meet any legitimate interests.

14. The Defendants, in committing the acts complained of herein, acted pursuant to a policy, practice, or custom of Rialto. In addition, the Defendants, in committing the acts complained of herein, are official policy makers for the city of Rialto in that their actions are not constrained by others and their actions represent actions by the municipality itself. At all times, the Defendants were aware of their acts and omissions, specifically their failure to comply with statutory and constitutional procedural and substantive requirements, and consequently the violations of law that derived thereof.

15. The Defendants acted despicably, with the intent to harm, oppress and deprive Plaintiff of his rights under the United States Constitution, entitling Plaintiff to punitive damages against the individual defendants in an amount to be proven at trial. At all times herein, the constitutional rights as described herein were clearly established.

16. Plaintiff is entitled to an award of reasonable attorney fees as allowed by law, including, without limitation, under 42 U.S.C. §1988.

VI.

PRAYER

WHEREFORE, Plaintiff prays:

1. For general, special, exemplary and punitive damages according to proof;

2. For costs of suit;

3. For attorneys fees under 42 U.S.C. §1988, and otherwise as permitted by law; and

4. For other appropriate relief.

Dated: May 15, 2008 Respectfully submitted,

LACKIE, DAMMEIER &
MCGILL AP

/s/ Michael A. McGill
Michael A. McGill,
Attorneys for Plaintiff
NICHOLAS B. DELIA

VII.

DEMAND FOR JURY

Plaintiff hereby demands a jury trial under F.R. Civ. P., Rule 38 and C.D. Cal. Rule 3.4.10.1.

Dated: May 15, 2008

LACKIE, DAMMEIER &
MCGILL APC

/s/ Michael A. McGill
Michael A. McGill,
Attorneys for Plaintiff
NICHOLAS B. DELIA

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Attorneys for Defendants
City of Rialto, City of Rialto Fire
Department, Stephen C. Wells, Mike Peel,
and Frank Bekker

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NICHOLAS B. DELIA, Plaintiff, v.	Case No. CV 08-3359 R (PLAx)
CITY OF RIALTO, A Public Entity; CITY OF RIALTO FIRE DEPARTMENT A Public Agency; STEPHEN C. WELLS, Individually and as the Fire Chief for the City of Rialto; MIKE PEEL, Individually and as a Battalion Chief for the	**AMENDED ANSWER OF DEFENDANTS CITY OF RIALTO, CITY OF RIALTO FIRE DEPARTMENT, STEPHEN C. WELLS, MIKE PEEL AND FRANK BEKKER TO PLAINTIFF'S**

City of Rialto, FRANK BEKKER, Individually and as a Battalion Chief for the City of Rialto; STEVE A. FILARSKY, Individually and as an Internal Affairs Investigator for the City of Rialto; and DOES 1 THROUGH 10 INCLUSIVE, Defendants.	COMPLAINT; DEMAND FOR JURY TRIAL

ANSWER

Defendants City of Rialto, City of Rialto Fire Department, Stephen C. Wells, Mike Peel, and Frank Bekker (collectively, "Defendants") answer the Complaint of plaintiff Nicholas B. Delia as follows:

1. Answering paragraph 1, Defendants deny the allegations contained therein.

2. Answering paragraph 2, Defendants admit that this Court has subject matter jurisdiction over this matter, and that venue of this matter is appropriately in the Central District.

3. Answering paragraph 3, Defendants admit the allegations contained therein.

4. Answering paragraph 4, Defendants admit that the City is a municipal corporation operating under the laws of the State of California and is situated in the County of San Bernardino. Except as

so expressly admitted, Defendants deny the remaining allegations contained therein.

5. Answering paragraph 5, Defendants admit that defendant Stephen C. Wells was at all relevant times the Fire Chief of the City of Rialto and that defendants Mike Peel and Frank Bekker were Battalion Chiefs for the City of Rialto. Except as so expressly admitted, Defendants deny the remaining allegations contained therein.

6. Answering paragraph 6, Defendants lack sufficient information or belief to admit or deny the allegations therein, and on that basis deny same.

7. Answering paragraph 7, Defendants deny the allegations contained therein.

8. Answering paragraph 8, Defendants incorporate their answers to paragraph 1 through 7 above as though set forth herein in full.

9. Answering paragraph 9, Defendants deny the allegations contained therein.

10. Answering paragraph 10, Defendants incorporate their answers to paragraph 1 through 9 above as though set forth herein in full.

11. Answering paragraph 11, Defendants deny the allegations contained therein.

12. Answering paragraph 12, Defendants deny the allegations contained therein.

13. Answering paragraph 13, Defendants deny the allegations contained therein.

14. Answering paragraph 14, Defendants deny the allegations contained therein.

15. Answering paragraph 15, Defendants deny the allegations contained therein.

16. Answering paragraph 16, Defendants deny the allegations contained therein.

AFFIRMATIVE DEFENSES

17. Defendants are informed and believe, and upon that basis allege, that the Complaint, and each claim for relief asserted therein, are barred, either in whole or in part, by operation of the doctrine of waiver.

18. The Complaint, and each claim for relief asserted therein, are barred because Plaintiff s own past conduct is an estoppel to the claims asserted in the Complaint.

19. The Complaint, and each claim for relief asserted therein, is barred by the fact that any actions taken towards Plaintiff by Defendants were undertaken in good faith and for a proper, business-related reason, which was neither arbitrary, capricious, nor unlawful.

20. To the extent that the Complaint has named and is seeking relief against Stephen C. Wells, Mike Peel and Frank Bekker, in their individual capacities, they are not proper parties to the lawsuit.

21. Defendants are informed and believe, and upon that basis allege, that the Complaint, and each claim for relief asserted therein, are barred, either in whole or in part, by the doctrine of qualified immunity.

22. To the extent that the Complaint seeks punitive damages against the City, it is barred by California Government Code section 818

WHEREFORE, Defendants pray for judgment as follows:

1. That the Complaint be dismissed with prejudice and that Plaintiff receive nothing by reason thereof;

2. That Defendants recover their attorneys' fees and costs of suit incurred in the defense of the above-entitled action; and

3. For such other and further relief as this Court in its discretion deems just and proper.

Dated: July 28, 2008

BEST BEST & KRIEGER

By: /s/ Cynthia M. Germano
HOWARD B. GOLDS
CYNTHIA M. GERMANO
Attorneys for Defendants
City of Rialto, City of Rialto Fire Department, Stephen C. Wells, Mike Peel, and Frank Bekker

GILBERT, KELLY, CROWLEY & JENNETT LLP
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Attorneys for Defendant
STEVE A. FILARSKY

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA— WESTERN DIVISION

NICHOLAS B. DELIA,

Plaintiff,

v.

CITY OF RIALTO, A Public Entity; CITY OF RIALTO FIRE DEPARTMENT A Public Agency; STEPHEN C. WELLS, Individually and as the Fire Chief for the City of Rialto; MIKE PEEL, Individually and as a Battalion Chief for the City of Rialto, FRANK BEKKER, Individually

Case No. CV-08-3359-R
[Unlimited Jurisdiction]

ANSWER AND AFFIRMATIVE DEFENSES BY DEFENDANT STEVE A. FILARSKY TO PLAINTIFF'S COMPLAINT

and as a Battalion Chief)
for the City of Rialto;)
STEVE A. FILARSKY,)
Individually and as an)
Internal Affairs)
Investigator for the City of)
Rialto; and DOES 1)
THROUGH 10)
INCLUSIVE,)
Defendants.)

Defendant, STEVE A. FILARSKY (hereinafter "FILARSKY") responds to the Complaint of Plaintiff NICHOLAS B. DELIA (hereinafter "Plaintiff) as follows:

PRELIMINARY STATEMENT

Plaintiff s Complaint (hereinafter "Complaint") violates Rule 8 of the Federal Rules of Civil Procedure and should be stricken in its entirety. FILARSKY objects to the Complaint to the extent that it seeks to impose upon him an obligation to respond to lengthy and overbroad allegations of fact in violation of Rule 8. Defendants will respond hereafter to the material allegations of the Complaint pled in conformity with Rule 8. All other allegations are denied. Furthermore, all responses provided hereafter are made in a good faith attempt to respond to Plaintiff s improper Complaint.

This Preliminary Statement is incorporated by reference in its entirety in each paragraph set forth hereinafter which responds to the separately enumerated paragraphs of the Complaint as set forth fully herein.

PREFATORY

1. FILARSKY admits, based on information and belief, that this is a Complaint for damages on behalf of Plaintiff and that Plaintiff is a firefighter employed by the City of Rialto. FILARSKY states that whether this is a complaint for "violations of an individual's constitutional rights to be free from unreasonable searches and seizures under the Fourth and Fourteenth Amendments to the United States Constitution, as well as the right to be free from invasions of privacy under the First, Fifth, and Fourteenth Amendments to the United States Constitution" is a legal conclusion to which no response is required. Moreover, whether Plaintiff "was compelled under threat of insubordination, to enter into his own home and produce personal, private property to City officials" is a legal conclusion to which no response is required: Further, FILARSKY states that reference to 42 U.S.C. Section 1983 in Paragraph 1 of the Complaint is a legal conclusion to which no response is required. If a response is required to the legal conclusion, FILARSKY denies the allegations contained in Paragraph 1 of the Complaint, to the extent that they are inconsistent with applicable law. Other than as specifically admitted, FILARSKY denies all other allegations in Paragraph 1 of the Complaint.

JURISDICTION AND VENUE

2. FILARSKY admits, based on information and belief that the conduct alleged to have occurred in the

Complaint occurred within the City of Rialto. FILARSKY states that reference to 28 U.S.C. §1343(3), 42 U.S.C. §1983, 28 U.S.C. §1343(4), and by 28 U.S.C. §§2201 and 2202 in Paragraph 2 of the Complaint are legal conclusions to which no response is required. If a response is required to the legal conclusions, FILARSKY denies the allegations contained in Paragraph 2 of the Complaint, to the extent that they are inconsistent with applicable law. Other than as specifically admitted, FILARSKY denies all other allegations in Paragraph 2 of the Complaint.

PARTIES

3. FILARSKY admits, based on information and belief, that Plaintiff is an employee of the City of Rialto. Other than that specifically admitted, FILARSKY denies all other allegations in Paragraph 3 of the Complaint.

4. FILARSKY admits, based on information and belief, that Defendant City of Rialto (hereinafter "Rialto"), is a public municipality organized under the laws of the State of California, situated in the County of San Bernardino. Other than as specifically admitted, FILARSKY denies all other allegations in Paragraph 4 of the Complaint.

5. FILARSKY admits, based on information and belief, that Defendant Stephen C. Wells (hereinafter "Wells") was, at all times relevant, the Fire Chief for the City of Rialto. FILARSKY also admits, based on information and belief, that Defendant Mike Peel (hereinafter "Peel") was, at all times relevant, a Battalion Chief for the City of Rialto. FILARSKY

further admits, based on information and belief, that Defendant Frank Bekker (hereinafter "Bekker") was at, all times relevant, a Battalion Chief for the City of Rialto. FILARSKY states that whether he was an "employee of the City of Rialto charged with conducting internal investigations" is a legal conclusion to which no response is required. If a response is required to the legal conclusion, FILARSKY denies the allegation contained in Paragraph 5 of the Complaint. Other than as specifically admitted, FILARSKY denies all other allegations in Paragraph 5 of the Complaint.

6. FILARSKY is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 6 of the Complaint, and therefore denies such allegations.

7. FILARSKY is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 7 of the Complaint, and therefore denies such allegations.

8. FILARSKY states that no response by him is required to the allegations contained in Paragraph 8 of the Complaint.

9. FILARSKY denies each and every allegation and legal conclusion contained in Paragraph 9 of the Complaint.

COUNT ONE

42 U.S.C. §1983 (Against All Defendants)

10. FILARSKY states that no response by him is required to the allegations contained in Paragraph 10 of the Complaint.

11. FILARSKY denies each and every allegation and legal conclusion contained in Paragraph 11 of the Complaint.

12. FILARSKY denies each and every allegation and legal conclusion contained in Paragraph 12 of the Complaint.

13. FILARSKY denies each and every allegation and legal conclusion contained in Paragraph 13 of the Complaint.

14. FILARSKY denies each and every allegation and legal conclusion contained in Paragraph 14 of the Complaint.

15. FILARSKY denies each and every allegation and legal conclusion contained in Paragraph 15 of the Complaint.

16. FILARSKY is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 16 of the Complaint, and therefore denies such allegations. FILARSKY further states that reference to 42 U.S.C. §1988 in Paragraph 16 of the Complaint is a legal conclusion to which no response is required. If a response is required to the legal conclusion,

FILARSKY denies the allegations contained in Paragraph 16 of the Complaint, to the extent that they are inconsistent with the applicable law.

PLAINTIFF'S RELIEF REQUESTED

17. FILARSKY denies that Plaintiff is entitled to any relief whatsoever.

DEFENDANTS' AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

18. That the liability of the persons ultimately determined to be responsible for Plaintiffs injuries and losses, if any, shall be compared, and the damages, if any, awarded to Plaintiff, shall be apportioned accordingly.

SECOND AFFIRMATIVE DEFENSE

19. At the time and place referred to in the Complaint, and before such event, Plaintiff knew, appreciated and understood each and every risk involved in placing him in the position he then assumed and that he willingly, knowingly and voluntarily assumed each such risk.

THIRD AFFIRMATIVE DEFENSE

20. The incidents described in the Complaint, as well as the injuries, losses and damages allegedly sustained by Plaintiff, if any, were proximately caused by intervening and superseding causes and forces which were beyond the control of Defendant FILARSKY and which, in the exercise of reasonable

prudence, was not and could not be anticipated or foreseen by Defendant FILARSKY.

FOURTH AFFIRMATIVE DEFENSE

21. Plaintiff s Complaint, and each purported cause of action contained therein, fails to state facts sufficient to constitute a cause of action against Defendant FILARSKY and/or fails to state a claim upon which relief can be granted.

FIFTH AFFIRMATIVE DEFENSE

22. The damages sustained by Plaintiff, if any, were proximately caused by the acts, omissions, negligence, fraud and/or breach of obligations directed toward Plaintiff by persons other than Defendant FILARSKY and beyond Defendant FILARSKY'S supervision and control.

SIXTH AFFIRMATIVE DEFENSE

23. The damages sustained by Plaintiff, if any, were the result of an unavoidable accident insofar as Defendant FILARSKY is concerned, and occurred without any negligence, want of care, fault, or other breach of duty to Plaintiff on the part of Defendant FILARSKY.

SEVENTH AFFIRMATIVE DEFENSE

24. Plaintiff has failed to mitigate the damages, if any, that Plaintiff has sustained and to exercise reasonable care to avoid the consequences of harms, if any, in that, among other things, Plaintiff has failed to use reasonable diligence in caring for any

injury, failed to use reasonable means to prevent aggravation of any injury, and failed to take reasonable precautions to reduce any injury and damages.

EIGHTH AFFIRMATIVE DEFENSE

25. Plaintiffs Complaint fails to state facts sufficient to support an award of attorney's fees under 42 U.S.C. §1988 or for any other reason.

NINTH AFFIRMATIVE DEFENSE

26. Plaintiffs Complaint, and each purported cause of action contained therein, fails to state facts sufficient to warrant the imposition of punitive damages against Defendant FILARSKY in that this responding defendant's actions and conduct was the result of a good faith and reasonable belief in the propriety of such actions and conduct.

TENTH AFFIRMATIVE DEFENSE

27. Defendant FILARSKY did not authorize or ratify any wrongful conduct toward Plaintiff by anyone acting within the course and scope of employment with any of the other named defendants.

ELEVENTH AFFIRMATIVE DEFENSE

28. Plaintiff consented to the conduct that is alleged to constitute a search and voluntarily complied with the action that is alleged to have caused him damage.

TWELFTH AFFIRMATIVE DEFENSE

29. Defendant FILARSKY is not liable to Plaintiff by reason of qualified immunity for his conduct in an advisory capacity to Defendant the City of Rialto.

THIRTEENTH AFFIRMATIVE DEFENSE

30. Plaintiff is estopped from asserting any rights, which he may have against Defendant FILARSKY.

FOURTEENTH AFFIRMATIVE DEFENSE

31. Plaintiff knowingly waived, by verbal expression or conduct any rights, which he may have had against Defendant FILARSKY.

FIFTEENTH AFFIRMATIVE DEFENSE

32. Defendant FILARSKY acted in good faith at all material times herein based on all relevant facts and circumstances known by him at the time he acted. Accordingly, Plaintiff is barred from any recovery in this action.

SIXTEENTH AFFIRMATIVE DEFENSE

33. The alleged injury to Plaintiff did not occur in a way that was reasonably foreseeable to Defendant FILARSKY based on the information known to Defendant FILARSKY on the date of the subject incident.

SEVENTEENTH AFFIRMATIVE DEFENSE

34. That any injury, loss, or damage purportedly sustained by Plaintiff was caused by persons or entities other than this answering Defendant, and that at all such times said persons or entities acted, if at all, without the consent, authorization, knowledge, or ratification of this answering Defendant.

DEFENDANTS' RELIEF REQUESTED

WHEREFORE, having answered Plaintiffs Complaint, Defendant **FILARSKY** respectfully prays for judgment against Plaintiff as follows:

1. Dismissal of Defendant FILARSKY from this action;

2. That Defendant FILARSKY be awarded costs; and

3. For attorneys fees and for all other relief that this court deems just and proper.

Dated: October 22, 2008

GILBERT, KELLY, CROWLEY
& JENNETT LLP

/s/ Jennifer West
Jon H. Teasdale
Jennifer West
Attorneys for Defendant
STEVE A. FILARSKY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

NICHOLAS B. DELIA,)
Plaintiff,)
)
v.) No. CV 08-3359 R
)
)
CITY OF RIALTO, A)
Public Entity; CITY OF)
RIALTO FIRE)
DEPARTMENT A Public)
Agency; STEPHEN C.)
WELLS, Individually and)
as the Fire Chief for the)
City of Rialto; MIKE)
PEEL, Individually and as)
a Battalion Chief for the)
City of Rialto, FRANK)
BEKKER, Individually)
and as a Battalion Chief)
for the City of Rialto;)
STEVE A. FILARSKY,)
Individually and as an)
Internal Affairs)
Investigator for the City of)
Rialto; and DOES 1)
THROUGH 10)
INCLUSIVE;)
Defendants.)

DEPOSITION OF NICHOLAS BRIAN DELIA
RIVERSIDE, CALIFORNIA
WEDNESDAY, DECEMBER 17, 2008

RON FERNICOLA & ASSOCIATES
CERTIFIED SHORTHAND REPORTERS
REPORTED BY: BARBARA R. REISDORF, CSR
7415
27720 Avenue Scott, Suite 140
Valencia, California 91355
FILE NO. 08871

* * *

[60] Q. Other than the symptoms that you had from this event where you were fatigued and determined to be anemic, all right, other than that, did you have any physical symptoms that you believe were caused by having to go to your house and produce insulation for your superiors?

A. Well, it was -- the whole event was very stressful and, you know, like I said, puzzled. I just --

Q. Tell me how -- tell me how the --

MR. MC GILL: Hold on. Let him finish what he's saying, please.

MR. TISDALE: Okay. Let me stop talking. I thought he was finished.

Q. BY MR. TISDALE: I'm sorry. I didn't mean to interrupt you.

A. That's okay. I mean very puzzled, very, you know, stressed out about the whole thing that, you know, here I'm being followed to my house, and I'm going to be followed by the battalion chiefs in broad daylight to go into my house and produce property and bring it outside.

Q. Did -- to your knowledge, did anybody observe this?

A. I was approached by one of my neighbors about a month later that had asked me what was going on.

[61] Q. Did that cause you embarrassment?

A. Yes.

Q. You mentioned that this was all very stressful. How did the stress manifest itself? Did you have physical symptoms?

A. I had some physical symptoms.

Q. What were they?

A. As far as -- I lost -- I've lost weight, you know.

Q. How much weight have you lost?

A. 20 to 30 pounds.

Q. How much did you weigh on September 18, 2006, approximately?

A. Approximately 270 pounds, I guess.

Q. How much do you weigh now?

A. 254 pounds.

Q. How much of that weight loss was because you were trying?

A. Probably about half would be a fair estimate.

Q. How else do you contend that the stress that occurred manifested itself?

A. Well, it occurred -- I mean it still occurs. It occurs at work mostly. I'm the brunt of several jokes that continually go on. "You know, stay away from Nick Delia," or, "Watch it when you're around Nick. [62] They're video-taping you." You know, I'm constantly looking over my shoulder. It's a consistent -- it's a consistent culture that has developed because of this incident.

Q. Other than whatever doctors you were seeing for the August 2006 incident that resulted in a Work Comp claim --

A. Right.

Q. -- did you seek other medical attention from any other healthcare providers for reasons related to this event on September 18, 2006?

A. No.

Q. Have you seen a psychiatrist or psychologist or mental healthcare provider as a result of this incident?

A. No.

Q. Have you seen a psychiatrist, psychologist, or other mental healthcare provider in the past ten years?

A. No, not --

Q. Have you seen a psychiatrist, psychologist, or other mental healthcare provider for any reason whether or not related to this incident from September 16, 2006, to the -- or September 18, 2006, to the present?

A. No.

Q. Do you have any medical bills that you attribute to the incident of September 18, 2006?

[63] A. No, not to my knowledge.

Q. Your complaint, I believe, alleges that you sustained some type of economic damage as a result of this incident. What is it?

A. Can I have some clarification? I'm not – when you say economic damage --

Q. Money. How did this event cost you money, in the form of expenses that you've incurred, income that you've lost or any other way that it can be measured?

A. Well, I know it's kind of held a stigma to my name being in the fire department as far as being able to take promotional tests, being a certified driver, being a certified company officer. You know, before all this occurred, I was selected by the battalion chiefs that were there, you know, a few years to be – before as firefighter of the year. I've always been a hard-working and dedicated employee to the fire department. And it seems like since this latest event has happened, that it has continually grown a stigma around my image as a professional firefighter and paramedic.

Q. And you don't think that has anything to do with the disciplinary action in connection with the prior investigation?

A. I can't answer that. I mean this has not only [64] affected, you know, both work relationships, but I mean here they come to my house. I'm constantly looking over my shoulder. People are making jokes continually about me.

Just recently in, I think, it was the end of October, beginning of March this year that we were given some money -- the firefighters union was given some money from the Joe Baca Foundation to purchase some wild land equipment. And somebody right there during the photo opportunity of holding this large check that we were given, and I was holding a corner of it, and they said, "Oh, Nick Delia should get used to holding a check." You know, and I found that to be offensive.

You know, and I did contact the fire chief, and I told him that, you know, this type of inappropriate behavior is still going on today.

Q. What is -- what did you understand someone to mean by Nick Delia holding the check?

A. That apparently I'm going to get a lot of money or some money and, you know, I don't -- I don't think it's right that people have this stigma or this opinion about me when it's not true, when I have not, you know, done anything that is improper or out of line.

Q. Okay. Let's come back to my question about economic damage. Is there anything that you can point [65] to that caused you to lose money as a result of this incident?

A. Well, other than what I have mentioned, I can't recall anything specific, but I'm sure there's things that are just not coming to mind right now.

* * *

[72] and taking it in and coming back out and not -- I don't know if they were still there or not, but they were still there when I was taking the first roll in.

Q. Okay. Now, how long prior to September 18, 2006, had you been demoted as a result of the other Internal Affairs investigation?

A. That event had taken place in June.

Q. Of 2006?

A. Yes, sir.

Q. Okay. And do you recall when the arbitration hearing on that demotion took place?

A. It wouldn't be until September 2007.

Q. Okay. Now, you were demoted from engineer back to firefighter?

A. Firefighter/paramedic.

Q. Okay. And did that demotion cause you any stress?

A. I think it's fair to say it caused me some stress, but it had been the process of -- you know, that has continued to be challenged and fought and there was a chance that I get -- there was some hope at the end of the tunnel.

Q. Well, by the time you were demoted, did that cause you stress?

A. Yeah. It caused me some stress.

[73] Q. Would you say it caused you more stress or less stress than this incident of showing the insulation materials on your grass?

A. Well, I think this event really put the – put the items in perspective, so to say, that that was an event that occurred at work, although, yeah, it did affect me, but this one event that we're discussing today is different in that, you know, it involved both work and then both my private life and coming to my home and being humiliated in my neighborhood at my -- at my home where, you know, there's people watching.

I was approached by a neighbor a month after. I don't know who else has seen me or seen that event. You know, no one has come forward or -- or said anything, but I know there were people in the area, in the neighborhood. It was around the end of school when people were walking home from school.

Q. The time of your demotion -- well, as a result of the demotion, you took a reduction in pay?

A. Yes.

Q. As a result of your demotion, you were -- your job title changed from engineer to firefighter?

A. Firefighter/paramedic, yes.

Q. As a result of the demotion, you -- your job duties at the fire department changed?

[74] A. Yes, they have.

Q. And the demotion was the result of some, you would agree, pretty serious accusations against you in terms of how you behaved on the job?

A. What do you mean by behavior on the job?

Q. Well, the reason for the demotion was – as given to you by the city was what?

A. The specific details of the demotion?

Q. Uh-huh. What was it that you were accused of?

MR. MC GILL: How is this relevant?

MR. GOLDS: Well, it goes to the emotional distress. It clearly goes to emotional distress, don't you agree?

MR. MC GILL: No, I don't.

MR. GOLDS: Okay. Well, I think you can't -- you have to look at all of the possible stressors in his life at that time, not merely this one in a vacuum.

MR. MC GILL: Well, I think he's separating out the two things.

MR. GOLDS: Well, I agree he's trying to. I'm not sure I accept the proposition. I do think I have a right to inquire about this.

Q. BY MR. GOLDS: Do you need to have the question reread?

A. Yes.

[75] MR. GOLDS: Would you please, Madam Reporter, reread the question?

(The requested portion of the record
was read by the reporter.)

Q. BY MR. GOLDS: Go ahead.

A. I'd say probably the most accurate depiction of the demotion is reflected in my case itself in my personnel file.

Q. My question was I want you to describe for me what it is that you were accused of. I'm not asking you where I can get that information otherwise.

MR. MC GILL: What information is the best evidence.

MR. GOLDS: Best evidence isn't a proper objection at a deposition, but --

Q. BY MR. GOLDS: So, please, go ahead and answer my question.

A. I -- to the best of my recollection, without reviewing those documents, it was for sending and receiving inappropriate and derogatory E-Mails.

Q. What was inappropriate about the E-Mails that you've sent or received?

A. That they included items that were sent to me that were pornographic in nature.

Q. Anything other than pornographic in nature?

[76] A. They were alleged -- there was one alleged racial remark and -- which was a joke, and it was depicted that there were other derogatory-type E-Mails.

Q. Derogatory toward other members of the fire department?

A. Not to the fire department.

Q. Other than members of the fire department?

A. No, not to my recollection.

Q. Derogatory towards the citizens of Rialto?

A. No.

Q. Who were they derogatory towards?

A. They were just funny video clips that were -- a few of them were commercials that were given to me.

Q. Well, did you view these charges at the time you first found out about them to be serious?

A. Yes, very serious.

MR. MC GILL: Vague and ambiguous as to serious.

Q. BY MR. GOLDS: The answer was yes?

A. Serious.

Q. And when did you first find out about the charges that led to your demotion?

A. I believe it was late February or March of '06.

Q. And were you at all -- well, the emotional distress you felt from this incident with the insulation [77] was humiliation; is that correct?

A. Well, humiliation and embarrassment.

Q. Okay. Were you all -- at all embarrassed or humiliated by these charges that led ultimately to your demotion?

A. I think it's fair to say yes.

Q. Were you at all embarrassed or humiliated by the demotion itself?

A. Yes.

Q. I assume everyone or at least most people in the fire department at some point recognized that you no longer were an engineer and had become a firefighter/paramedic?

A. That was pretty obvious.

Q. And were you embarrassed or humiliated?

MR. TISDALE: Does that mean yes?

Q. BY MR. GOLDS: I took it as a yes.

A. Yes.

Q. And were you at all embarrassed or humiliated by that?

A. Yes, but the conduct that -- I'm not the brunt of any jokes about a demotion. I'm still the brunt of jokes about being videotaped and followed home and ordered to produce personal property.

Q. Did you --

[78] A. In fact, I don't think that I've ever heard anybody comment about me being demoted in the presence of me being there.

Q. Did you tell people about the fact that you had been followed home and photographed, producing insulation?

A. Can you repeat the question?

Q. Sure. After this event where you produced the insulation on your grass, did you tell your -- some -- some co-workers at the fire department of what had taken place?

A. Yes.

Q. Okay. So is it -- to your knowledge, is there any source for these people who are making jokes about you, is there any source of knowledge from -- for these people as to what occurred that could lead to these jokes other than your telling them about it?

MR. MC GILL: And the four board members?

MR. GOLDS: We haven't gotten -- I haven't asked him that question.

MR. MC GILL: Well, I'm asking, other than those four too?

MR. GOLDS: I don't know whether they did or not. That's my next question.

THE WITNESS: At some point it was mentioned. [79] I can't recall specifically who, when, and where.

Q. BY MR. GOLDS: I'm sorry?

A. At some point it was mentioned to somebody within the fire department.

Q. Who -- when you say at some point it was mentioned, it was mentioned by whom?

A. It was mentioned by myself.

Q. Okay. So -- so after -- so since this incident, you have had occasions in which people have made what you believe to be jokes about the incident; is that correct?

A. Yes.

Q. Okay. Are you aware of whether Battalion Chief Bekker or Battalion Chief Peel has ever told anyone within the fire department of what occurred that day?

A. Not to my knowledge.

Q. You're aware that you told people, however?

A. Yes, I am.

Q. Are you aware of whether the -- any of the four -- four board members of the union told anyone?

A. I'm not aware.

Q. Are you aware whether Stuart Adams ever told anyone?

A. I'm not aware.

Q. Are you aware of whether Mr. Filarsky ever told [80] anyone?

A. I'm not aware of that.

Q. So at this point, would it be fair to say that as far as you're aware, the only source for the information that led to these jokes is what you told people?

A. Well, I can't remember who, like I said, I told, but the jokes are coming from people that I don't associate with in the fire department. They're not coming from the people that are closely related to me.

Q. Well, you don't recall who you told about the incident, correct?

A. Specifically, no.

Q. So you don't know how many people you told, do you?

A. Probably comes to mind -- no.

Q. Okay. Do you know who they told, if anyone?

A. No.

Q. Do you know whether the -- because of what you told these unknown number of people, whether the story has now gotten around the fire department?

A. No.

Q. Do you know whether you're the source of information that ultimately filtered through the fire department and led to these jokes?

[81] A. Can you repeat the question, please?

MR. GOLDS: Can you reread the question, please?

(The requested portion of the record
was read by the reporter.)

THE WITNESS: I don't know if I'm the direct source, but the incident happened, and I did say things.

Q. BY MR. GOLDS: At the time you said things, did you understand that you didn't have to talk about this disciplinary event with others in the department?

A. I'm sorry. Can you repeat the last --

Q. Sure. At the time you told these other unknown people about what had occurred, you understood you didn't have to tell them, right?

A. I didn't have to tell them. I mean --

Q. You could have kept it private?

A. I was pretty upset about the whole --

Q. I understand.

A. -- event taking place.

Q. I understand. But you could have kept it private, correct?

A. Yeah. I could have. Pretty hard to do.

Q. Why?

A. I was upset.

Q. So why does that make it hard to keep it [82] private?

A. Well, sometimes it's good to talk about things with people that are closest to you.

Q. Okay. And so you made a decision to talk about it with your co-workers?

A. That I'm closest to.

Q. Did you ask them to keep it to themselves?

A. I can't recall specifically.

Q. People who made jokes about this, do you recall their names?

A. Well, the one that comes to mind is the one that I described previously about the check, and that was Craig Haunstein, and I spoke to Chief Ballard about it, gave him the details on the telephone about it, and he said that he would speak with him.

Q. What was the -- that's a firefighter?

A. Yes, sir.

Q. And what's his last name?

A. Haunstein.

Q. H-a-l-l?

A. No, H-a-u-n- --

Q. -- -s-t-e-i-n?

A. Yeah, something like that.

Q. Now, what was the joke that Mr. Haunstein said exactly, to the best of your recollection?

[83] A. Well, it was more of a statement rather than a joke that I didn't find to be funny or appropriate.

Q. Okay. And what is it that Mr. Haunstein said?

A. That I should get used to holding a check like that.

Q. And what was your -- that was all he said?

A. Yeah.

Q. Okay. So what was your interpretation of the meaning of Mr. Haunstein's statement?

A. That potentially I could be receiving some money.

Q. Why would you be receiving some money?

A. Why don't you ask Mr. Haunstein?

Q. Well, you were offended by it, right?

A. Yeah. I don't find those types of jokes or statements to be funny.

Q. Well, what is it that was -- what is it about his statement that offended you?

A. That I would be holding a check or would be coming into some money from the City of Rialto.

Q. Well, how does that relate to the incident involving the insulation being placed on your grass?

A. I think it's pretty fair to say that most, if not all, the fire department knows that I -- a federal lawsuit has been filed on my behalf.

[84] Q. So Mr. Haunstein's statement didn't refer to the incident involving the insulation. It refers to this litigation, in your mind?

A. In my opinion, yes.

Q. Okay. So Mr. Haunstein wasn't making a joke about the insulation being shown. He was making a joke about the fact that you sued the city?

A. Correct.

Q. And Mr. Haunstein's joke, in your mind, had to do with the fact that you were going to make money from this litigation?

A. Yeah. I don't find it to be funny nor do I think you would find it to be funny, sir.

Q. Whether I would or not, it involved the litigation, right?

A. Yes.

Q. How long after the incident did you tell these other people at the fire department who you don't recall about what occurred?

A. I can't recall any specific time line.

Q. Well, was it in days? Weeks?

A. I'm sure it was within the days surrounding the incident.

* * *

[92] MR. MC GILL: Separate IA? If you know.

THE WITNESS: I don't know specifically.

Q. BY MR. GOLDS: Well, were you ever questioned in regards to the discipline that was being contemplated against those other gentlemen by the city?

A. No. The only interview I had was in regards to mine.

Q. Okay. Now, you indicated to Mr. Tisdale that part of the manner in which the emotional distress manifested itself was you lost weight?

A. Yes.

Q. And it sounds like you lost about 30 pounds?

A. Give or take.

Q. And over what period of time was that?

A. I would say within a three- to five-month period.

Q. Commencing when?

A. Starting somewhere end of September running through the end of the year.

Q. Okay. And you attribute half that weight loss to trying to lose weight?

A. Well, I think it's fair to say yes.

Q. Okay. And what were you doing during that three- to five-month period to try and lose weight?

A. I was walking the dog.

[93] Q. Change your eating habits at all?

A. Somewhat.

Q. So you cut back or at least tried to eat the right things?

A. Yes.

Q. *Do any other thing to lose weight?*

A. I began bicycling towards the end of the year.

Q. So on what do you base your belief that half of your weight loss or I guess about 15 pounds was attributable to emotional distress?

A. I just -- I don't know. I just feel like, you know, there was a lot of -- I don't know how to describe -- describe it, per se.

Q. Well, you've testified that you believe half the weight loss was caused by the emotional distress. Why do you think that?

A. Well, I've never lost approximately 30 pounds in that short a period of time.

Q. Are you happy that you lost 30 pounds?

A. Yeah. Yes.

Q. At this time, when you were losing the 30 pounds, were there any other things in your life causing you stress other than the incident involving putting the insulation on your grass?

A. Well, I think the -- the events surrounding, [94] you know, being on administrative leave and – caused some stress in the relationship that I have with my wife.

Q. This is the leave that commenced on September 12th?

A. Yes.

Q. And went through three or four days, the 21st or 22nd?

A. Yes.

Q. Okay. And how did that cause stress in your life with your wife?

A. Well, I think it's just relationship stress, stress of the events and, you know, she was concerned that, you know, I was on administrative leave, threat of possibility of losing my job. I mean all of those things create stress in any relationship.

Q. So your testimony is that during that time period, September 12 to approximately September 21st or 22nd of 2006, you had some marital problems?

A. I think that's fair to say.

Q. And your claim is that the sole cause of those marital problems was your being out on administrative leave?

A. Well, the whole incident was I mean very stressful for -- I mean being on administrative leave [95] is -- I don't know. It -- to me, it was worse than -- than what had happened to me. I mean that's the way I feel about it.

Q. Well, what -- in this whole event, what was it that caused the most stress? Your showing the insulation on the grass or your being out on administrative leave?

A. It was being ordered to go home. It was the whole event. I mean it started from -- it's not just one particular thing. It starts from the beginning, and it reaches an end and --

Q. You understand you're not suing because you were placed on administrative leave, right?

A. Yeah. I understand that.

Q. You're just suing because you had to show the insulation on your grass?

A. Right. Ordered to go home and produce the insulation.

Q. Insulation. And so -- but the issues with your wife were caused by your being on administrative leave, right?

A. No, not specifically.

Q. Are you saying that having to put the insulation on your grass caused --

A. No. I'm saying the whole events that have [96] taken place as a result of this investigation up to and including being placed on administrative leave, ordered to go home and produce personal property is stressful on the marital relationship whom I wasn't married to at the time.

Q. So your testimony is that -- well, let me ask a better question.

Would it be correct to say that you cannot separate the emotional distress from being on administrative leave and whatever emotional distress having the IA caused and the emotional distress from your concern about losing your job during that time period? You can't separate that from the emotional distress that you suffered as a result of having to put the insulation on your grass?

A. Well, I don't know specifically how to separate it.

Q. Then the answer to the question is, yes, you cannot separate it; is that right?

A. Yeah. I can't separate it. I don't think if you asked her she could separate it as well.

Q. Other than your losing weight and having marital problems at least during this time period of September 12 to the 21st or 22nd, is there any other way that the emotional distress you suffered manifested [97] itself?

A. Sleepless nights.

Q. When did those commence?

A. Well, a lot -- a lot of it was throughout that whole, you know, point where you're waiting to see what's happening, and then you're on, you know, the administrative leave part of it, and then I have to go to my house and -- you know, and it still occurs today.

Q. So the sleepless nights commenced before you had the interview on September 18, 2006?

A. Yes.

Q. And they continued after the -- the interview?

A. Yes.

Q. Did it occur during the time you were going through the arbitration on your demotion?

A. Yes.

Q. Did it occur after you got the decision on your demotion?

A. Yes.

Q. Anything other than losing weight, marital problems during that time period, and sleepless nights?

A. I can't recall any specifics right now, but I'm sure that there are others.

Q. Okay. Have you ever seen a doctor or taken any medicine because of the sleepless nights?

[98] A. I've never seen the doctor for that, no. I've taken Benadryl to help me fall asleep a few times, but nothing that's been a prescription medication.

Q. Have at any time subsequent to September 12, 2006, you've seen -- seen a psychologist or a psychiatrist for any issues?

A. No, sir.

Q. Have you and your wife had any family or marriage counseling during that time period?

A. No, sir.

Q. Has your personal family physician treated you at all for any emotional distress issues?

A. No, sir.

* * *

[103] the fire department but had asked --

Q. He wondered why there was a fire department vehicle?

A. Yeah. Had asked what was going on. I mean -

Q. Did he say anything about insulation?

A. I can't recall specifically. He just asked what was going on and, you know, saw a whole bunch of cars out there on that day and --

Q. What did you tell him?

A. Well, I told him it was just some ridiculous stuff that had happened at work and, you know, I wasn't too happy about it.

Q. And that was the end of it?

A. Yeah. We didn't talk about it after that.

Q. Okay. Did it -- you mentioned that it got around about the fact that you had to go into your house and bring out this insulation, meaning that it got around the fire department?

A. Yes.

Q. Did it get around the fire department while you were demoted?

MR. MC GILL: If you know.

THE WITNESS: I don't know specifically. I mean I'm sure things have come out, but I haven't heard -- I mean like I -- I believe I testified earlier, [104] I'm not the brunt of any jokes about being demoted. I'm --

Q. BY MR. TISDALE: Well, I'll get there. I'll get there in a minute.

One of the allegations that gave rise to your demotion was that you authored an E-Mail which contained a joke that referred to black men as niggers; is that correct?

A. Yes, sir.

Q. Did you send that E-Mail to any of your co-workers?

A. No, I didn't send it to any co-workers.

Q. Who did you send it to?

A. I sent -- I had sent it to a friend of mine that worked for another fire department in another state. It was in -- I was in E-Mail correspondence with.

Q. So did that E-Mail in which you referred to black men as niggers ever get sent back to any of your co-workers such that they saw it?

MR. MC GILL: If you know.

THE WITNESS: I remember being told the joke before typing it out and almost immediately sending it out at that point.

Q. BY MR. TISDALE: Who told you the joke?

[105] A. Ryan Cathey.

Q. Ryan -- what's the last name?

A. C-a-t-h-e-y.

Q. Is he a co-employee?

A. Yes.

Q. Is he still there?

A. Yes.

Q. So you heard the joke from him and immediately thought that you should send it to somebody else?

A. Yeah, because the person that I was sending the correspondence with, we had -- from time to time had sent jokes back and forth.

Q. You thought it was funny?

A. The way it came out, it was funny.

Q. You were also accused during that investigation of transmitting, by E-Mail, photographs of naked men and women. Is that true?

A. Well, I guess there was one of a naked man with a tattoo on his genitalia.

Q. And did you send that E-Mail to any of your co-workers?

A. I received it from a co-worker, a fire captain, and I had sent it -- I didn't send it to -- I believe I didn't -- I don't remember sending it to anybody – one of my co-workers. I do remember sending it to one other [106] person. His name is Jim Reing.

Q. Co-employee?

A. No.

Q. Who was the fire captain that you received it from?

A. Fire Captain Dan Cox.

Q. Where was he a captain?

A. At one of the fire stations in the City of Rialto.

Q. Is that the only naked photograph that you recall sending?

A. I had received other E-Mails from -- I think it was one other E-Mail from Andy Lore and had forwarded it to one or two other people, not co-workers, people outside the fire department.

Q. Do you believe that it got around the Rialto Fire Department where you were specifically stationed that you had done these things via E-Mail, and that was the reason for your demotion? Did your co-workers know about it?

A. I think it's fair to say, yes, they did know about the E-Mails.

Q. Do you think that that incident would -- referring to black men as a nigger and sending naked photographs of male genitalia was more humiliating to [107] you than producing a roll of fiberglass insulation?

A. Well, those were jokes, and it was sent in a joking manner in the context of, you know, those events. I don't think being ordered home to provide –

provide personal property which is insulation is a joke. I don't take that to be funny.

Q. Well, my question is which of those two events -- when it became known that each had occurred, which was more humiliating to you?

A. I'd say being ordered home.

Q. Okay. And which --

A. Because I'm still the brunt of jokes today.

Q. Which of those -- which of those events do you believe was more harmful to your career?

MR. MC GILL: Calls for speculation.

THE WITNESS: I don't -- I don't specifically know how to answer that.

MR. TISDALE: I have nothing further.

* * *

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NICHOLAS B. DELIA, Plaintiff,	Case No. CV 08-3359 R (PLAx)
v.	
CITY OF RIALTO, A Public Entity; CITY OF RIALTO FIRE DEPARTMENT A Public Agency; STEPHEN C. WhLLS, Individually and as the Fire Chief for the City of Rialto; MIKE PEEL, Individually and as a Battalion Chief for the	**DECLARATION OF FRANK BEKKER IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT**

City of Rialto, FRANK BEKKER, Individually and as a Battalion Chief for the City of Rialto; STEVE A. FILARSKY, Individually and as an Internal Affairs Investigator for the City of Rialto; and DOES 1 THROUGH 10 INCLUSIVE,

Defendants.

Filed Concurrently with:

1. Notice of Motion and Motion for Summary Judgment;
2. Memorandum of Points and Authorities in Support of Motion;
3. Proposed Statement of Uncontroverted Facts and Conclusions of Law;
4. Declaration of Mike Peel;
5. Declaration Stephen C. Wells;
6. Declaration of Howard B. Golds;
7. Request for Judicial Notice;
8. Proposed Judgment

Date: February 2, 2009
Time: 10:00 a.m.
Dept.: 8

DECLARATION OF FRANK BEKKER

I, Frank Bekker, declare as follows:

1. I have been employed by the City of Rialto Fire Department since January 2, 1990. Since 2004, I have held the rank of Battalion Chief which means that I am generally responsible for the management of one of the three shifts that man the City of Rialto Fire Department at any given time. The matters set forth in this Declaration are within my firsthand knowledge and I would be competent to so testify.

2. On September 18, 2006, I was asked to sit in on an interview being conducted by Steve Filarsky ("Filarsky") with a Rialto firefighter named Nicholas Delia ("Delia"). I do not recall exactly who asked me to sit in on the interview of Delia although I believe it was either Rialto Fire Chief Steve Wells ("Wells") or Mr. Filarsky. I believe that the reason I was asked to sit in on the interview was that observing the proceedings would be good training for me in terms of internal affairs investigations.

3. I do not have a distinct recollection of much of what occurred during Mr. Filarsky's interview with Delia. However, I do recall that at some point, Mr. Filarsky and Stuart Adams ("Adams"), the attorney representing Delia in the internal affairs investigation, got into an argument regarding whether Delia would be willing to show City personnel certain fiberglass building insulation that Delia was apparently keeping in his house. Although my subsequent understanding was that Mr.

Filarsky went down the hall of the fire station to speak to Chief Wells about the issue, I did not leave the interview room and I did not participate in any conversation between Chief Wells and Mr. Filarsky regarding the giving of an order to Mr. Delia to show the fiberglass insulation.

4. I also recall that Mr. Filarsky did order Delia to remove building insulation from his house and show it to the City so that the City would know that the fiberglass had not been installed in his house. At some point during this conversation, Mr. Adams threatened to sue both myself and Battalion Chief Mike Peel ("Peel") who was also present at the interview.

5. At no time during the internal affairs interview did I actually participate in the interview. I have reviewed the transcript which is attached to the declaration of Mike Peel as Exhibit "A" and it does not reflect any statements being made by me during the course of the interview. This is consistent with my recollection that I simply sat through the interview and did not participate.

6. At no time did I participate in any discussions with Mr. Filarsky, Chief Wells or anyone else about whether Delia should be ordered to show the building insulation that was kept in his house. To this day, I have no personal knowledge of how that decision was made or who participated in making that decision. However, I do know that I did not participate in making the decision and the question of whether the order should be given was not discussed in my presence.

7. I also did not order Delia to produce the building insulation from his house. The only person who did that orally as far as I was aware was Mr. Filarsky. At the time Mr. Filarsky gave this order, I believed it was legal both because Mr. Filarsky was a lawyer and he gave the order and because we were *not going to be entering Delia's house.*

8. After the interview of Delia ended, Battalion Chief Peel and I were asked by either Chief Wells or Mr. Filarsky to drive to Delia's house in a City fire vehicle and observe the building insulation which Delia would show us. As I recall, I drove the vehicle and Battalion Chief Peel sat in the front passenger seat. Upon arriving at Delia's house, I parked the car by the curb. Neither Battalion Chief Peel nor I ever left our vehicle. We were told that Mr. Adams had gotten lost on his way to the house and that he would be there in a few minutes. He arrived approximately ten minutes later, at which time Delia and Mr. Adams walked into Delia's house and a short time later, Delia brought out what I recall to be three rolls of fiberglass building insulation. It took Delia less than a minute to bring the rolls out from his house and he simply laid each roll on his front lawn. After bringing out the last roll, Delia indicated that this was all he had and at that point, Battalion Chief Peel *thanked Delia for showing us the insulation and* we drove off. I don't believe that we were parked in front of Della's house for more than a minute while the insulation was actually brought out and displayed.

I declare under penalty of perjury the foregoing is true and correct.

Executed on this 9th day of January, 2009 at Rialto, California.

/s/ Frank Bekker
Frank Bekker

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and Frank Bekker

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NICHOLAS B. DELIA, Plaintiff, v.	Case No. CV 08-3359 R (PLAx)
CITY OF RIALTO, A Public Entity; CITY OF RIALTO FIRE DEPARTMENT A Public Agency; STEPHEN C. WELLS, Individually and as the Fire Chief for the City of Rialto; MIKE PEEL, Individually and as a Battalion Chief for the	DECLARATION OF MIKE PEEL IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT

City of Rialto, FRANK BEKKER, Individually and as a Battalion Chief for the City of Rialto; STEVE A. FILARSKY, Individually and as an Internal Affairs Investigator for the City of Rialto; and DOES 1 THROUGH 10 INCLUSIVE,

Defendants.

Filed Concurrently with:

1. Notice of Motion and Motion for Summary Judgment;
2. Memorandum of Points and Authorities in Support of Motion;
3. Proposed Statement of Uncontroverted Facts and Conclusions of Law;
4. Declaration of Frank Bekker;
5. Declaration Stephen C. Wells;
6. Declaration of Howard B. Golds;
7. Request for Judicial Notice;
8. Proposed Judgment

Date: February 2, 2009
Time: 10:00 a.m.
Dept.: 8

DECLARATION OF MIKE PEEL

I, Mike Peel, declare as follows:

1. I have been employed by the City of Rialto Fire Department since 1975. Since 1998, I have held the rank of Battalion Chief which means that I am generally responsible for the management of one of the three shifts that man the City of Rialto Fire Department at any given time. The matters set forth in this Declaration are within my firsthand knowledge and I would be competent to so testify.

2. On September 18, 2006, I was asked to sit in on an interview being conducted by Steve Filarsky ("Filarsky") with a Rialto firefighter named Nicholas Delia ("Delia"). Prior to the time of the interview, I was not aware that Delia was the subject of an ongoing internal affairs investigation nor did I know anything about what I was about to witness. I do not recall exactly who asked me to sit in on the interview of Delia although I believe it was either Rialto Fire Chief Steve Wells ("Wells") or Mr. Filarsky. I don't entirely recall why I was asked to sit in on the interview although I believe it had something to do with my administrative duties as Battalion Chief.

3. I do not have a distinct recollection of much of what occurred during Mr. Filarsky's interview with Delia. However, I do recall that at some point, Mr. Filarsky and Stuart Adams ("Adams"), the attorney representing Delia in the internal affairs investigation, got into an argument regarding whether Delia would be willing to show City personnel certain fiberglass building insulation

that Delia was apparently keeping in his house. At some point (and I am not certain as to the exact sequence of events), a break was taken in the interview and Mr. Filarsky left the room. My subsequent understanding was that he went down the hall of the fire station to speak to Chief Wells, although I did not know where he was going at that time. I did not leave the room. I did not participate in a conversation between Chief Wells and Mr. Filarsky at that time.

4. Thereafter, I recall that the interview restarted and Mr. Filarsky ordered that Delia remove building insulation from his house and show it to the City so that the City would know that the fiberglass had not been installed in his house. At some point during this conversation, Mr. Adams threatened to sue both myself and Battalion Chief Frank Bekker ("Bekker"), who was also present at the interview. I recall that at some point, Battalion Chief Bekker, Chief Wells and Mr. Filarsky and I were talking in the room where Delia's interview was taking place and someone, I'm not sure who, asked Mr. Filarsky if we were going to be in legal trouble because Delia had been ordered to allow the City to inspect the insulation and Mr. Adams had threatened us with a lawsuit. My recollection is that Mr. Filarsky assured us that we would not be in any legal trouble and that there was no problem in having Delia show us the building insulation that was kept in his house.

5. I actually participated in the interview only one time, at the very beginning of the interview when Mr. Filarsky asked me to order Delia to tell the truth. This is routinely done in internal affairs

investigations so that the employee will be subject to discipline if it later turns out that he or she was untruthful. Attached to this Declaration as Exhibit "A" is a true and correct copy of the transcript of the interview conducted of Delia on September 18, 2006. I believe it is an accurate record of what was said during the Delia interview. It does not reflect any statements being made by me during the course of the interview other than me giving the order to Delia that he be truthful. This is consistent with my recollection.

6. At no time did I participate in any discussions with Mr. Filarsky, Chief Wells or anyone else about whether Delia should be ordered to show the building insulation that was kept in his house. To this day, I have no personal knowledge of how that decision was made or who participated in making that decision. However, I do know that I did not participate in making the decision because I never left the interview room and the question of whether the order should be given was never discussed other than the one question that was raised as to whether Battalion Chief Bekker and I would be subject to personal liability because the order had been given.

7. I also did not order Delia to produce the building insulation from his house. The only person who did that orally as far as I was aware was Mr. Filarsky. At the time Mr. Filarsky gave this order, I believed it was legal both because Mr. Filarsky was a lawyer and he gave the order and because we were not going to be entering Delia's house.

8. After the interview of Delia ended, Battalion Chief Bekker and I were asked by either Chief Wells or Mr. Filarsky to drive to Delia's house in a City fire vehicle and observe the building insulation which Delia would show us. As I recall, Battalion Chief Bekker drove the vehicle and I sat in the front passenger seat. When we arrived at Delia's house, Battalion Chief Bekker parked the car by the curb. Neither of us ever left the vehicle. We were told that Mr. Adams had gotten lost on his way to the house and that he would be there in a few minutes. He arrived approximately ten minutes later, after which Delia, Mr. Adams and at least one representative from Delia's union walked into Delia's house and a short time later, Delia brought out what I recall to be three or four rolls of fiberglass building insulation. It took Delia less than a minute to bring the rolls out from his house and he simply laid each roll on his front lawn. After bringing out the last roll, Delia indicated that this was all he had and at that point, I thanked Delia for showing us the insulation and Battalion Chief Bekker and I drove off. I don't believe that we were parked in front of Delia's house for more than a minute while the insulation was actually brought out and displayed.

I declare under penalty of perjury the foregoing is true and correct.

Executed on this 9th day of January, 2009 at Rialto, California

/s/ Mike Peel
Mike Peel

TRANSCRIPT OF INTERNAL AFFAIRS INVESTIGATION

Nicholas B. Delia v. City of Rialto, et al., No. 2:08-cv-03559-R-PLA (Filed Jan. 12, 2009)

DATE: September 18, 2006
TIME: 10:02 a.m.
LOCATION: Rialto Fire Department
Battalion Chiefs' Conference
Room
ATTENDEES: Nick Delia
Stuart Adams, Attorney for May
Battalion Chief Mike Peel
Battalion Chief Frank Bekker
Steve A. Filarsky

SF Mr. Delia, as you know my name is Steve Filarsky. I have been asked to do an investigation concerning a couple of items, which we will get into momentarily.

You have been directed to be here by the Department. If Mr. Adams would like an order for you to be here, we can give you an Order. As a consequence of that order anything you say in this investigation cannot be used in any sort of criminal process.

SA I would prefer to have the order and make it clear that he is ordered to answer the questions.

SF Go ahead Chief Peel.

MP Nick you are ordered to be here today and you are to answer the questions truthfully.

SA Because of the threat of discipline nothing he says can be used against him in a criminal proceeding?

SF That is correct.

SF Sir you have a couple of obligations today. One is to be here and fully cooperate and answer questions. If at any time it is deemed you are not cooperating then you can be held to be insubordinate and subject to disciplinary action, up to-and including termination. Do you understand that sir?

[2] ND Yes sir.

SF You also have an, obligation to tell the truth. If at any time it is determined that you have not told the truth, you could be subject to disciplinary action up to and including termination. Do you understand that sir?

ND Yes sir.

SF We are tape-recording today. You need to speak up clearly and audibly in responding to questions. The tape will not pick up shakes of the head, nods or anything like that.

ND Yes sir.

SF Mr. Adams is also taping. If at any time you want to take a break, step outside, get a drink of water, use the restroom, consult with Mr. Adams, just holler and we will turn off the tapes. We will ask Mr. Adams to take his tape out when he leaves.

Because it is being tape-recorded, in addition to speaking up clearly and audibly, it is important that we not talk over each other that you allow me to finish my question before you begin an answer. Similarly I will allow you to finish your answer before I begin another question.

SF With that, let's go ahead and get started.

SA Can you give us an idea of what the allegations are?

SF It concerns his time off in August and the first part of September.

SA Sick leave, vacation, both?

SF I think it is either sick leave or IOD. I think it is uncertain as to what it is at this point in time.

[3] SA Alright. I am going to interpose an objection. If there are any questions regarding work-related injuries the Workers' Compensation Appeals Board has exclusive jurisdiction in this matter and the proper method to obtain discovery is by means of noticing and the deposition, not by means of compelled statement as we are doing her today. I reserve the right to raise any objections under the exclusive jurisdiction objection.

SF Okay. Sir, I have a supervisor worker injury report for the City of Rialto which indicates that you experienced dizziness and weakness on August 10, 2006. Do you recall that?

ND Yes sir, I do.

SF I want to show you and your counsel the form. Did you complete any part of that form or was that completed by your supervisor?

ND I completed the top portion once I returned to work from being seen in the emergency room.

SF When you say the top portion, can you show me what portion you completed sir?

ND Name, department, date, information about was the supervisor notified of injury, nature of injury. At that point that is all that I was experiencing, the dizziness and weakness.

SF You were taken to the emergency room on duty?

ND Yes sir.

SF Approximately what time was that?

ND I believe it was maybe 11:00 or noon or 11:30 -- somewhere around that time.

SF Did you return to work on your shift or were you put off work?

ND I was put off work.

[4] SF Was there any sort of preliminary diagnosis by the emergency room, when you went in?

ND What I was told was my weakness and dizziness was associated with some anemia and they didn't know where that was coming from until they had run some more tests. Also, hypokalemia, that means low potassium, I was told by the emergency room physician.

SF Was this the first time you were advised that you had potential anemia.

ND I had been advised one other time and it was approximately 20 years ago.

SF Was this the first time you had been advised about hypokalemia?

ND Yes sir.

SF Which emergency room did you go to sir?

ND To the Kaiser Fontana Emergency Room.

SF I have a report of occupational injury, which appears to have been signed by you at the bottom. Is that correct?

ND Yes sir, that is my signature.

SF Then I have what is called a DWC-1 Form which is a claim form and that also appears to be signed by you in the middle? Is that correct?

ND Yeah, I was instructed to fill out these forms when I came back to get my personal items after being seen in the emergency room.

SF On the 10th?

ND Let me see this calendar. The 10th, yes.

SF Then I have I believe the first Kaiser documentation. Take a moment to look at that. It is kind of a poor Xerox copy, but [5] that appears to put you off for three calendar days, is that correct?

ND I can't tell the date, but one of them was from the emergency room to the physician. Okay there is the 10th -- starting with the 10th -- that was the day I was seen in the emergency room. Three calendar days and I was instructed by the doctor there to follow-up with my physician. That would have been on the 15th I believe, without looking at my information.

SF This first Kaiser note, if you will. This you received when you were at the emergency room on the 10th?

ND Yes sir.

SF The instructions were for you to follow-up with your primary care physician or follow-up with Kaiser?

ND Follow up with my primary care physician. An appointment was made in the emergency room.

SF Is Kaiser your primary health insurance?

ND Yes sir.

SF Were you given any restrictions by the doctor when you received this on August 10th?

ND He said since my hemoglobin was low and I was feeling weak and dizzy, and they hadn't been able determine where I could possibly be bleeding from, that I was to remain off work and to take an iron supplement as well as a potassium supplement.

SF They told you they believed you were bleeding?

ND Yes sir.

SF When was the next time you went to see your physician?

[6] ND I think it was Tuesday, August 15.

SF This was a Kaiser physician?

ND Yes sir.

SF Do you recall the name of the physician you saw?

ND Dr. William Delo.

SF Is he a general family practitioner?

ND Yes I believe so -- that is his title.

SF Did you get another off work order at that point in time[?]

ND Yes I did from him.

SF Let me show you an off work order again from Kaiser. It is dated August 15, and it appears to give you eight days off.

ND Right.

SF Do you recall receiving that?

ND Yes sir.

SF Did Dr. Delo make any sort of diagnosis?

ND He wanted to schedule me for flex sigmoid colonoscopy. I believe that is the first procedure, so they can make some determination on where the bleeding was coming from.

He referenced that information in his computer and said they would be calling me by the end of the week -- that week of the 14th through the 18th. I was there on the 15th, so he said by the end of the week I should hear something from them on an appointment. They would probably schedule something the first part of that week or the beginning of the following week.

[7] SF Did you in fact hear from them?

ND No, I didn't hear from them. Since my fiancé works in the emergency room I had asked a friend of hers that works there to see that a doctor gets my information, because the doctor had made it sound like it was serious enough for me -- since I was anemic. They wrote a referral for me to the GI doctor and there were apparently two GI doctors that looked up my information and had set up an appointment for me to have the procedure endoscopy and colonoscopy done on the 22nd or 23rd. I can't remember right off hand. But since my hemoglobin, which is the part of your blood that makes you anemic was really low. They were concerned that I should be seen as soon as possible. It was like a second opinion, basically.

SF Did you have the colonoscopy on the 22nd or 23rd?

ND Yes I did, endoscopy and colonoscopy, which is more thorough than the original flex sigmoid colonoscopy that I was initially going to have.

SF They put you under for the colonoscopy?

ND They partially put you under on Demerol and Valium.

SF That took place at Kaiser?

ND Yes, Kaiser in Ontario, by a GI specialist.

SF When you saw Dr. Delo on the 15th of August did he give you any sort of restrictions on your activities?

ND If I could back up just a second. When I was seen in the emergency room, the physician there had told me until you get your hemoglobin back up to normal, which I believe without looking at it is 14 to 16, however they measure it. It should take anywhere from four to six weeks, he suspected, with [8] taking iron supplementation and then depending on how I feel and also changing diet to eat things that have more iron in them, those types of things.

So my lab work is constantly being monitored on a weekly basis.

SF Were you put on any sort of prescription medicine back on the 10th when you saw the doctor?

ND Not prescription, just the vitamin supplement of the iron. Oh the potassium was a prescription medicine.

SF You were put on that on the 10th?

ND Yes sir.

SF Are you still on that?

ND No.

SF How long were you on the potassium prescription?

ND For approximately one week. My lab work was subsequently checked and the potassium had come up so he said I didn't need to take it anymore.

SF That was after a week?

ND Yes sir.

SF On the 15th when you saw the doctor the second time or saw Kaiser the second time, you saw Dr. Delo, were you put on any prescription medication at that time?

ND No sir.

SF It was within a day or two that you stopped the potassium?

ND Yeah, because he had checked my lab work that week and had called me on the phone and said [9] I didn't need to be taking the potassium anymore.

SF When you saw the doctor on the 10th in the emergency room, did he give you any sort of activity restrictions as to what you could and could not do?

ND None specific. He said just to take it easy and to rest. He recommended not working and performing the functions of a Firefighter/Paramedic and give my body a chance to, you know, kind of rebuild itself.

SF Did you in fact take it easy after August 10?

ND Yeah, I did.

SA Through what period of time?

SF Let's say through the send doctor's appointment on August 15.

ND Yes sir.

SF Then when you saw Dr. Delo on August 15 did he give you any sort of activity restrictions?

ND No activity restrictions. He asked how I was feeling and I said well I have been feeling a little bit better since I was taking the iron supplement and the potassium and I wasn't feeling dizzy anymore. So he said he would like to check my lab work again in a week and see him again in a week. Just kind of go from there -- it depends on how I feel -- if I felt like I could perform the functions of a Firefighter then to go back to work.

SF On the 15th did you discuss with Dr. Delo performing the functions of a Firefighter?

ND He asked what my occupation was and I told him.

SF Did he ask you how you felt about returning to Firefighter duties on the 15th?

[10] ND Yes.

SF What did you tell him?

ND I told him that I wanted my lab work to some up, so I wasn't as weak or wouldn't be feeling inadequate to perform the essential functions of my job.

SF Was the dizziness gone by the 15th of August?

ND I would say no. I still was experiencing a little dizziness.

SF When did the dizziness end?

ND It is really hard to say, maybe the weekend of the 19th or the first part of that week.

SF Was the dizziness on a daily basis?

ND It kind of came and went. There were points when I was dizzy. If I would bend over and get up kind of quick then I would be dizzy.

SF What about the weakness that you experienced back on August 10th; did you still have weakness on August 15 when you saw Dr. Delo?

ND I still felt weak. They didn't put me on any driving restrictions or said that I couldn't perform the daily functions that I would normally do around the house and those types of things. No driving restrictions; it was all restricted to work.

SF What specifically you couldn't do at work as of August 15 based on your weakness?

ND Well I felt like if I had to physically move somebody -- I was concerned about if I had to carry somebody from a building, I guess, the most, or lift somebody up or those types of things, you know, really strenuous type of activity that Firefighters, perform.

[11] SF What kinds of activities did you engage in between August 10 and August 15 when you were off duty, when you were at home.

ND Mostly just kind of taking care of myself, trying to eat better. I don't remember specifically?

SF You weren't eating spinach were you?

ND No, I did have some spinach, but it wasn't bagged spinach. I remember changing my diet to eat healthier things, like you know, greens and meats. I remember barbequing one of those days. I don't remember doing anything strenuous at all, maybe walking, you know. I had to take my son to school on a couple of those days, on the 14th, 15th, and 16th. I didn't feel like I was two week to drive or do any of those functions. If I would have then I would have had my fiancé take him.

SF What about after August 15, when you saw Dr. Delo, what kinds of physical activities did you engage in at home?

ND I was walking the dog in the morning for maybe a half hour. That is something I had been doing previously and I was kind of getting back to doing that once I started feeling not as weak and dizzy anymore for like a half hour. The doctor said that was okay to do.

SF What about things like yard work?

ND It was just up to him to see how I felt. I remember taking out the trash. Trash day was Tuesday. No, the yard didn't get cut for a while on the back. I don't remember what day it got taken care of.

SF Do you have a secondary business of some sort?

ND No sir.

[12] SF You are not involved in a secondary business of any sort?

ND I have a hobby of woodworking and building cabinets and those types of things, but it is just for myself and my friend.

SF You just build for yourself and your friend?

ND Yes, mostly. I have made projects around the house.

SF Do you sell any of your woodwork?

ND I have not sold any of my woodwork, no.

SF Does your friend sell any of your woodwork?

ND No, he didn't sell any of my woodwork[.]

SF Did you do any woodworking while you were off duty since August 10?

ND No -- the last couple of days I have but nothing around the 10th and those first few weeks.

SF Let's exclude the last week. Today is the 18th, let's go back to September 11. Between August 10 and September 11 do you recall doing any woodworking?

ND I may have been in the garage doing a couple of things. I was making a cutting board for my sister as a wedding gift on scrap wood that I had had in the garage.

SF Is that the only woodworking you can recall doing?

ND As far as I can recall, yes sir.

SF What about any sort of remodeling or construction projects around the house? Anything between August 10 and September 11?

[13] ND I am currently working an remodeling the kitchen, but I haven't done any specific related to that project.

SF You haven't done a thing?

SA In that timeframe?

ND Not from 8/10 to 9/11, no.

SF Have you had anybody working on the project[?]

ND I have had a few people come over to the house and tint the windows on the side of the house and in that kitchen area as well.

SF Any work on your, kitchen between August 10 and September 11?

ND No sir.

SF Have you used anybody from the Department to work on your kitchen?

ND No sir.

SF Have you ever discussed your kitchen project with Steve May?

ND Yes sir.

SF Do you recall when?

ND Most recently he had come by the house on a Saturday I believe.

SF Saturday of Labor Day?

ND Labor Day is the 4th. I believe it was the second.

SF Do you recall what time he came by?

ND It was, I would say, in the morning time, a.m., maybe 9 or 10ish. I remember because that is the night of the hockey tournament that afternoon so we had to get ready to go do that.

[14] SF Do you recall how long he stayed?

ND Maybe a half [h]our or 45 minutes.

SF Did you take him in and show him the kitchen?

ND I did show him some of the kitchen. He hadn't been over to the house in at least a few months. I had done a lot since he had last been to the house.

SF When do you recall him being over at the house before then?

ND I would have to say maybe towards the beginning of the year or the end of last year.

SF The calendar year?

ND The calendar year, yes sir.

SF What prompted him to com[e] over on Saturday, September 2nd?

ND He said he was going to be in the area and wanted to come by and see how I was feeling.

SF Did you know it was his duty day that day?

ND I hadn't really been paying attention to duty days. I know he works on the B shift, but didn't know that Saturday was his normal day to work.

SF Did you know he called in sick that day?

ND Not that I recall; he didn't say anything to me.

SF He didn't say anything to you at all about calling in sick that day?

ND No. He said he had some schedule time off and he was looking forward I guess to going to the beach the following week or something. [15] I really didn't talk to very many people at work since I have been off.

SF That Saturday morning you didn't realize it was the B shift and he was supposed to be working that day?

ND No.

SF Did he tell you what his plans were for the rest of the day?

ND He was going to some barbeque, I believe, and was out running errands and had been in the area and wanted to stop by.

SF Did he tell you what other errands he had run in the area?

ND No sir.

SF Did you ask him about the errands?

ND No. He wanted to see how I was feeling. It was mostly small talk and he came in and I showed him some of the stuff I had been working on in the kitchen, and that was pretty much it.

SF You didn't do any work on the kitchen at all between August 10 a[n]d September 11?

ND No, I didn't do any work to my kitchen on those days[.]

SF Did anybody do any work on your kitchen between those days?

ND The window tint guys came. I don't remember what day they came, but I know that I wasn't -- I was just trying to keep off my feet. It had to be the week of --. It may have been the 31st or even the 30th, I am not sure which day they came over.

SF 30, and 31st of August?

ND Yes sir.

[16] SF Did you have a guy named Tim Langley doing any work for you during that period of time?

ND Not during that period of time though[.]

SF H[a]s Langley done work for you?

ND Yeah, he has.

SF During what period of time did he do work for you?

ND It was in December and May.

SF What kind of work did he do for you?

ND We did some plumbing work in my kitchen area and we did some ductwork in my attic, and think it was before I had come back to work in July -- the end of July when I was off on vacation. We finished moving some gas pipes that needed to be moved. It was probably the last week of July or the first week of August.

SF Did any of that duct work or moving the gas pipe involve tearing out any walls or anything like that, ceilings, anything like that?

ND No, that had all been done beforehand.

SF When you say done beforehand, when had that been done?

ND Most of it had been taken care of in December of 2005.

SF So this has been a long-term remodeling project?

ND Yes sir.

SF Did he work gratis or did he invoice you for his services?

ND He invoiced me for his services.

[17] SF So you would have invoices of all the services and dates of services?

ND Yes sir.

SF He hasn't worked at you[r] residence since August 10?

ND No sir.

SF Other than the window tinter, has any other subcontractor or any other people worked at your house that you can recall?

ND No, I usually do most of the work unless you know --.

SA Since August 10?

SF Since August 10.

ND Just the window tint guys. It was that last week of August that they had come. I don't remember specifically which day though.

SF The duct work that was done, when was that, December or May?

ND Which duct work?

SF You said you did duct work with Mr. Langley.

ND There was some ductwork that was done in May and there was some that was done for the kitchen area at the end of July, possibly the 1st week of August, but I think it was more towards the end of July.

SF Where was the location of the ductwork?

ND In the attic.

SF Was that heating, air conditioning, or both?

ND Both.

SF The July ductwork was kitchen?

[18] ND Yeah, but there was no ceiling and no walls so it was accessible from underneath.

SF Underneath the house?

ND Without going into the attic. The attic was exposed so we didn't have to go up. It took maybe all of an hour or two at the most.

SF Did you have to reinsulat[e] after the ductwork[?]

ND It hasn't been reinsulated in the kitchen yet, but I have some insulation that I purchased -- rolls of insulation -- maybe this big -- I have four of them that I had in the garage and I moved them out and they were probably sitting in the driveway. I had my son move them and then I carried them into the house one day. They are sitting in the house right now.

SF When did you purchase them?

ND Without looking at a receipt maybe the week of August 21 - 25 I am thinking.

SF Do you recall where you purchased it?

ND It was either Lowe's or Home Depot.

SF This is while you were off duty?

ND I was off since the 10th. I had procedure done (the colonoscopy) either the 22nd or 23rd. Somewhere in that week I would imagine.

SF I have another off-work order from Kaiser that is dated on the 22nd for an additional eight days off.

What, restrictions mere placed on you by your doctor after the colonoscopy?

ND Still they were monitoring my hemoglobin. It had come up some but it wasn't back to [19] normal. Like I said the doctor had told me in the emergency room that it would take several weeks to be back to normal to where I would feel strong again. So yeah, this was from the date of the colonoscopy and then was instructed to then follow-up with the physician, Dr. Delo, and have my lab work checked again.

SF When did you last see Dr. Delo?

ND It probably would, have been the 29th. Yes, it was the 29th.

SF Before Labor Day?

ND Yes.

SF Did Dr. Delo release you that day?

ND Yeah he did release me back to work that day.

SF On the 29th?

ND Yes sir, that I could go back on the 4th, that was his --. There is probably another work order. I think there were three total.

SF That is the last one that I have -- the one dated the 22nd.

ND There was one releasing me back to work on the 4th, which was Labor Day, but I had a scheduled vacation day that day.

SF So the 4th was your normal workday?

ND Yes sir.

SF You had vacation and you took a vacation day?

ND Yes sir.

SF Did you stay in town or did you go somewhere?

ND I went to Anaheim. There has got to be another one.

[20] SF The last one I showed you, and I will tell you right now this is the only one that we have, the latest one that that we have. It puts you off for 8/22 to 8/29.

ND Okay.

SF Would 8/29 have been a duty day for you?

ND No sir.

SF When would you[r] next duty day have been after 8/29?

ND The 30th. So there is one that is not here.

SF Would you have a copy of that at home?

ND Yes sir. I faxed it to Chief Bruce on that day, the 29th.

SF It is Kaiser slip?

ND Just like this. It says return to work, no restrictions.

SF It puts you off on August 30?

ND Yes sir. On the 29th I also had a procedure done by a doctor after my doctor's visit with Dr. Delo.

SF What kind of procedure?

SA I object, it may be calling for confidential medical information. It is not a work related claim. I am instructing him not to answer without waiving the, right to raise any confidentiality under HIPPA and other protections. I would instruct him not to answer the question at this stage.

SF So what kind of procedure did you have after you saw Dr. Delo?

ND Do I answer the question? I do answer the question.

[21] I went to the medical office in Kaiser Fontana to see a doctor. I can't remember his last name right off hand where he was a general surgeon, where he

was going to band some internal hemorrhoids that I had.

SF That is fine; that is enough. Did you have the procedure done on August 30th[?]

ND On the 29th.

SF Did that preclude you from working on the 30th[?]

ND I had an off work order for one that you don't have.

SF You saw the doctor on the 29th and he gave you an off work order for the' 30th, the following day?

ND Yeah, he said I could go back to work starting the week of the 4th, and I faxed that. You say you don't have it.

SF I am sorry, who did you fax that to?

ND I spoke with Chief Bruce on the phone. I called and spoke to Jolene and then asked for the Duty Chief, and whoever was assigned to that day wasn't here at the time.

SF Did you fax from home or from Kaiser?

ND From home.

SF After September 4, your next duty day is when, September 6?

ND September 6, yes.

SF Did you work that day?

ND No sir, I didn't

SF Why not.

[22] ND I was still feeling ill from the effects of the procedure that I had on the 29th.

SF Did you call in sick?

ND Yes sir.

SF Who did you speak to?

ND The Duty Captain.

SF Do you recall who that was?

ND I believe I called in the morning so it would have been the "C" Shift Duty Captain, either Bob Nelson or Jeff Barrett. I don't recall who I spoke with.

SF Do you recall what time of day it was you called?

ND I believe it was first thing in the morning, approximately 6:30.

SF Do you recall giving a reason for your absence?

ND I was a little embarrassed to say the reason I wasn't feeling good, so I told him that I had the flu.

SF Here is an employee's report of time off that was taken by Captain Nelson. So when he states flu, that is the reason you stated to him, is that correct?

ND I was embarrassed and I didn't feel I needed to tell him that I had a procedure done and I was still feeling a great deal of discomfort.

SF Since August 10 and up to September 11, that window that we were dealing with before, do you recall purchasing any other construction materials besides insulation?

ND I bought insulation and maybe a piece of plywood or a 2 x 4 or something; it is on the side of my house.

[23] SF What was the plywood purchased for, do you recall?

ND I need a small piece, so I had to buy a larger piece. I didn't want to leave it in my truck, so I had to put it on the side of the house.

SF It is sitting there now?

ND Yes sir.

SF You said a 2 x 4 or some 2 x 4s?

ND Maybe one or two, I don't recall specifically, but it was made with that purchase of insulation that I referenced before.

SF What were the 2 x 4s going to be used for?

ND Probably in the kitchen area.

SF What specifically, do you recall?

ND Not really, I haven't used it yet.

SF What about the plywood? What was that going to be used for -- the smaller piece?

ND Well it wasn't a small piece. I needed a small piece and they didn't have one so it is still on the side of the house -- for a shelf or something in the garage if I can recall.

SF The insulation -- you said there was four rolls?

ND Yes sir.

SF That is that fiberglass insulation?

ND Yeah, it is the pillow spongy stuff.

SF That is still sitting in your kitchen?

[24] ND Yes, I moved it into the kitchen because it was in the garage and then it was outside and then it got put back in the garage.

SF So where is it as we speak today, in the kitchen?

ND In the kitchen.

SF So if we visited your house today we would find the insulation in your kitchen and we would find the plywood on the side of the house and the 2 x 4s somewhere around?

ND Yes sir. Is there any water?

SF Sure we will take a short break; it is quarter to eleven.

I am turning the tape back on. It is about 10 minutes to 11:00.

Sir, I actually had that in my file and didn't realize what it was. I will show it to you, and you can see how it came through on the fax machine.

ND Oh wow, that is terrible.

SF It does appear that this one puts you off until 9/3/06. That is what you recall faxing to the Department, is that correct?

ND That is correct.

SA Off until 9/6?

SF 9/3/06. Your first duty day would have been 9/4 is that correct?

ND Yes, and I had scheduled a vacation day that day.

SF Since August 29 have you been back to see any physicians at Kaiser?

ND No, I haven't. I was schedule to return today, but I had to cancel that appointment [25] to be here. I have been back to Kaiser to have my lab work drawn.

SF Blood work drawn?

ND Yes sir.

SF As we speak today, as far as you know, you have a full release from Kaiser?

ND Yes sir.

SF Did they ever diagnose or come up with a cause of the anemia?

ND That I had esophagitis -- there is an ulcer in my esophagus.

SF Do they treat that with medicine?

ND They treat that with prescription medicine, Prilosec. I was given that on the day of the procedure. The doctor wrote me a prescription for that.

SF When you say the day of the procedure – the colonoscopy.

ND Yes.

SF You are still taking that medication?

ND Yeah, he said to continue taking it.

SF Going back to the purchase of the plywood and the insulation, you don't recall a specific day that you purchased that?

ND Not without the receipt at the house.

SF Those are the only building materials that you can recall purchasing between August 10 and September 11[?]

ND Yes sir.

SA By the plywood and 2 x 4 are you including the insulation?

[26] SF Yes.

ND During the course of my procedure on the 29th I had been in contact with my Duty Captain, Steve Cunningham, trying to keep him updated with my health and what is going on. He sympathized with me because he had something similar in regards to the procedure.

SA He knew what the procedure was?

ND Yeah, he knew what the procedure was?

SF Are you talking about the colonoscopy issue or the hemorrhoid issue?

ND The colonoscopy issue.

SF August 20 was a duty day for you, is that correct?

ND August 10?

SF The day you were injured.

ND Yes sir.

SF What was your next duty day?

ND That would have been the 12th.

SF And then?

ND The 17th.

SF The 17th?

ND Yes sir.

SF So that was a Thursday, right?

ND Yes sir.

SF You mentioned your fiancé earlier. Do you ever take her to work and drop her off and pick her up?

[27] ND No, not to work.

SF Do you recall visiting the San Bernardino Court Building on August 17th?

ND Yeah, I do. She had jury duty that day.

SF What court building was that?

ND The one in Rancho Cucamonga.

SF You live in Rancho, is that correct?

ND That is correct. She asked if I would take her over there. It is hard to find a parking spot and we live pretty close.

SF You mentioned shuttling your son around at times, taking him to school. Do you recall going to Chino to pick up your son at tennis courts?

ND Yes sir.

SF Does your son live over there part time?

ND It is not Chino; it is actually like North Corona area. I think it was maybe that day that his mother called and he had hockey practice that night and I needed to meet her somewhere along the way so he would get there on time. So I kind of left in a hurry because it was the light of his first practice with his new team.

SF Ice hockey or roller hockey?

ND Ice hockey.

SF Where is the ice hockey rink located?

ND He plays at the Anaheim Jr. Ducks.

SF I want to show you some videotape real quick that was taking by an investigator. It is August 17. Is that you in the back of the picture? Let me rewind it for you so you can see.

[28] ND I was walking up to my house, I believe.

SF That is you walking behind a boat?

ND Yes sir.

SF That is your residence in Rancho?

ND Yes sir.

SF Do you recognize the car?

ND Yes that is our car. She drives it primarily.

SF I am going to fast forward through some of this. By the way if either you or Mr. Adams wants me to stop, pause or rewind at any spot, just let me know, and I will do so.

That is your son coming towards you?

ND Yes sir.

SF We switched to August 18, the next day. Is this your front yard?

ND Yeah; where the truck is, not where the boat is.

SF The boat belongs to the next-door neighbor?

ND Yes sir.

SF That is your truck there?

ND Right.

SF You recognize where you are?

ND DMV.

SF That is you on the telephone with the hat?

ND Yes sir.

[29] SF Do you recall what you had to go to the DMV for?

ND I needed to get a printout of my driving record.

SF Is that you walking out of the DMV office?

ND Yes sir.

SF Do you recognize this location?

ND Yeah, that is the place where I bought some circuit breakers for my house.

SF That is for the kitchen remodeling?

ND Yes sir.

SF Are those circuit breakers installed or not installed as of today.

ND Not installed because I had the exchange for different ones. They are sitting in the kitchen, along with the insulation.

SF Are the ones you exchanged them for still sitting in the kitchen?

ND That is what I just said.

SF Do you recognize where you are now?

ND Pep Boys.

SF Do you recall what you had to purchase there?

ND I was looking for some glue for some bicycle tires, but they didn't have it.

SF Is this Rancho?

ND Yes sir I believe so.

SF Is that Office Max?

ND Yes sir

[30] SF Do you recall what you had to get there?

ND I needed to get some labels for a label maker. I think I went to Lowe's after this.

SF Is that Lowe's right there?

ND Yeah.

SF It appears that you are loading at least a couple of 2 x 4 into the back of the truck bed?

ND Yes sir.

SF Here is the second one. Are those 8' 2 x 4s?

ND Yes sir.

SF Do you recall what else you purchased there?

ND I got a plastic pot and some rolled tarpaper.

SF What is the tarpaper for?

ND It is for the fireplace on the backside of the house before I paint.

SF Is that tarpaper still in a roll at your house?

ND Yeah, it is in the garage.

SF Here you have those bundles of insulation.

ND Yes.

SF That is the insulation we talked about before?

ND Yes sir.

SF It is still bagged at your house?

ND Yes sir.

SF Do you recall what thickness of plywood that was?

[31] ND I think it was ½ inch plywood or 3/8 inch.

SF Full sheet 4 x 8?

ND Yeah.

SF Again, is this the front of your house?

ND Yes sir.

SF We get to about 7:30 and it appears that you are unloading or will unload. It looks like the materials are still in the back of your truck?

ND Yes sir.

SF Do you recall who that is -- there was a head that kind of went by near you

ND You will have to play it back for a second.

SF Let me play it back real quick. I think it is right after --

ND That might have been the neighbor's son or daughter -- the house on this side.

SF You go out of the picture and there is a head that comes in right there.

ND That is the neighbor.

SF I think this is about where the 18th ends. Do you have a woodshop of some sort set up in your garage?

ND Yes, I have some woodworking equipment in there.

SF What kind of equipment do you have in there?

ND I have a table saw, a miter saw, sander, clamps, plainer, and joiner.

SF Does it pretty much take up your entire garage?

[32] ND Yes sir.

SF You had mentioned bird houses before – who is it you build those bird houses for?

ND No birdhouses -- I didn't say anything about a birdhouse.

SF Are you involved in birdhouses in any manner?

ND No sir.

SF This is all just personal woodworking that you do in the garage?

ND Yes sir.

SF Nothing for sale to other people?

ND No.

SF The light is really faint there, do you recall off hand what you were doing -- do you recognize what you are doing?

ND It looks like opening the garage -- that is all it could be.

SF Off hand, you can't tell what activity you were involved in at the time?

ND There is a lawnmower in the garage right there. I might have been moving it, but can't -- I don't know what that --. The garage is kind of full so I might have been moving some things around. It looks like that white tree that is in the front of my house.

SF It appears like you are watering.

ND You know what I think I might have been spraying for weeds or something. That looks like me -- or watering -- hosing off the bricks okay? There is brickwork right there. I hadn't really been outside too much.

[33] SF This is the next day. Do you recognize that sedan?

ND Yeah it was my fiancé's niece's car. I had taken my truck to get serviced in Fontana the morning of the 19th.

SF I am going to stop this tape real quick. I want to take a look at a couple of other things.

Saturday, [A]ugust 26 would have been a workday for you, is that correct?

ND Yes sir.

SF From August 10 to September 11, did you ever do any sanding with a hand sander?

ND I may have. As I explained before, I was working on the cutting board with some scraps wood in the garage. I was making my sister a wedding gift.

SF How much time do you think you spent working on the cutting board?

ND Maybe an hour or two at the most.

SF Was that a disk sander that you were using?

ND Yeah, one of the handheld palm sanders they call them. I think it is five inches.

SF I want to turn off the tape records momentarily and ask you both to step outside while I confer with the Chiefs. It is about 11:13. We will turn off the tapes.

We are turning the tape back on. It is almost 11:25. A couple of things here. At the present time, I don't have any more questions. It may be necessary to reinterview you at some point in time. If so, I will contact you through Mr. Adams.

There are a couple of things that I am going to request of you as part of this. First you [34] have indicated that those building materials that were observed in the video are presently at your home uninstalled. What I want to do is to verify that after you leave here today. So I would like Chief Peel to follow you home to your personal residence and to have you to allow him access to view those building materials where they are.

SA You don't have to consent to the search your house.

SF You don't have to. What I am asking you to do is voluntarily do that.

SA My advice is don't do it.

ND I am going to follow the advice of my attorney.

SF Okay. Then we will do it a different way. What we will do is we will send you home, and we will have Chief Peel follow you and I will direct you to bring out the piece of plywood and bring out the three bundles of insulation. Any problem with that?

SA Is that an order?

SF Yes.

SA He is being ordered to bring out property from his house that is his personal property?

SF Yes.

SA Is there a legal basis for you to order that?

SF To verify that that material still exists as he states.

SA I don't think you are entitled to order somebody to go into their house and bring articles of their own personal belongings out of the house without a search warrant. That circumvents the whole process.

[35] SF We don't need a search warrant for an administrative internal investigation.

SA You can't get into a guy's house.

SF I am not asking to get into his house.

SA By asking that he go in and bring items of his own personal property out, you are issuing an illegal order and violating his right to be free of unreasonable search and seizure. You are also subjecting the City to civil liability for violation of his 4th Amendment rights to be free from unlawful search and seizure. You don't have any right to ask him to bring items of personal property out of his home.

SF I am asking him to demonstrate that the materials he indicated here -- he still has in his kitchen.

SA You are not asking him, you ordered him to do it, and that is different. If you ask him to do it and he consents that is one thing. If you order him to do something, you are violating his right to be free of unreasonable search and seizure.

We will sue the Department for violation of his 4th Amendment rights. If these Chiefs don't speak up and say they don't want to do it, then we are going to name them to.

SF Let's start with asking. You have stated that those materials are still there.

ND That is correct.

SF What I want to do is simply verify it.

SA My advice is you don't to voluntarily do it and don't do it voluntarily.

SF So I will ask you if you will voluntarily just bring out the three bundles of insulation to show that they are still there and they are not installed.

[36] SA You don't have to do it, and my advice is don't do it.

ND I am going to follow the advice of my attorney.

SF Now, we are going to order you to remove those three bundles of insulation.

ND There are four.

SF There are four, okay. Four bundles and just simply bring them outside and show Chief Peel that they were in your house.

SA It is out position that it is a violation of his right to remain free of unreasonable search and seizure and we will file claim for violation of his 4th Amendment right, and we will name any Chief that participates in it, and we will name the Fire Chief who is sitting down there allegedly under whose authority you are acting.

We might quite possibly find a way to figure if we can name you Mr. Filarsky. You are issuing an illegal order. You have no right to ask him to bring items of personal property outside of his house. If you want to take that chance, you go right ahead.

That would be Chief Becker and Chief Peel who will both be named in the complaint.

SF Second item, we would like a note of some sort from Kaiser verifying the procedure that you had on the 29th. Any problem with that?

SA Do not consent to that. Are you ordering him to present that?

SF Let's deal with asking first. I need a response. I am asking you to voluntarily produce a note from the Dr. as td the procedure that took place on August 29.

[37] SA My advice is do not voluntarily produce anything.

ND I am going to follow the advice of my attorney.

SF Okay, now you are being ordered to produce a note from your doctor with respect to the procedure that took place on August 29, do you understand that?

SA. No, I don't understand that because that is an overly broad order and I don't know where you have the authority to make such an order. That is an overly broad order and it is vague. It has to be unconstitutional. It is a violation of his rights under the HIPPA laws that protect his privacy.

He has not made a workers' compensation claim regarding that and you have no right to invade his personal privacy on a personal medical issue under these circumstances. You have a legitimate off work order for that time period and you have no right to pry any further.

That will be an illegal order and that will be added to the cause of action for violation of his rights to be free of unreasonable search and seizure and violation of his rights under the California Constitution as well under the rights of HIPPA.

SF Let me make sure we are clear on this Mr. Adams. He called in sick the day in question.

SA That is correct. You have no policy that requires him to bring in a medical, documentation to prove it.

SF The reason he stated for the absence was flu. He has just stated that wasn't the reason, that there was an underlying reason that he was too embarrassed to disclose.

SA [inaudible]

[38] SF I understand that. All I am doing is asking for verification that there was an underlying reason that you didn't want to disclose. Since you have put your medical condition in issue.

SA No, he has not put it in issue. It was put in issue by you bringing him in here and asking him questions. He has not put in issue. You have legitimate off work orders. He has not put it at issue, you put it at issue. He is not producing anything voluntarily, and if you want to issue illegal orders, you can do so, and you guys can suffer the consequences.

SF The order is --.

SA Where do you have the authority? I have not seen anybody with, authority order him to do anything yet. Whoever issues that order is going to be named in the lawsuit.

SF I will have the authority after I describe the order; we will issue the order from the Department so that you fully understand it.

SA You better make sure it is clear. In fact I would like the orders in writing please.

SF We will be perfectly clear so there is no debate as to what the orders were later on.

SA We are not voluntarily cooperating in this investigation, and if you want to issue illegal orders and take the chance that you are going to get sued and the Department is going to get sued, everybody is going to get named, and they are going to sweat it out as to whether or not they have individual liability, you go right ahead.

SF Well I am not going to issue anything in writing. If you have any misunderstanding or uncertainty as to the order, you can go back and listen to your tape because you have tape.

[39] SA Make sure it is clear.

SF The order is to provide documentation from your physician as to the procedure that took place on August 29 that caused you to miss work.

SA That is vague and ambiguous and I don't understand what it is you are asking my client. What specifically are you asking for that documentation to contain?

SF All I have to do is have a note from the doctor saying, Mr. Delia underwent whatever the procedure was on August 29. It is plain and simple.

SA You have no right to that information. You are creating an illegal order and you might want to take a minute to think about it.

SF The second part of it is --

SA By the way, when is that documentation due?

SF By close of business on Wednesday.

SA What is the documentation, according to your order? By the way, I still haven't heard anybody with any kind of authority issue an order yet. I want to hear the person is going to issue the order, issue the order exactly as to what he is supposed to do.

SF I am issuing the order on behalf of the Department.

SA You don't have that authority.

SF Sorry Mr. Adams, if you want to challenge --.

SA Listen, you don't work for the Department, you are a citizen, you are just like me, you don't have any authority here other than them hiring you and paying you to do the investigation. The guys with the authority are the guys sitting her with the bugles on [40] their collars. You have none; you have no authority. The only reason that we are answering questions is because that gentleman right there issued the order, and so we are answering questions, not you. If these guys want to Order him, you order him and you will be named and that is not an idle threat.

SF And at the end when we are done with the orders, they will ratify the order and then you can go off.

SA Maybe they want to not d[o] that. Maybe you want to talk to them.

SF The second part of this is that we would like a note from the doctor that your anemia or your other condition precluded you from working from August 10 to September 4.

ND You have the off work order.

SA You sure do.

SF All I have is an off work order.

SA That is enough; that is all you need.

ND It says I can return to work without restrictions.

SF What I want is a note from the doctor that specifically says your anemia prevented you from performing the duties of --.

SA You have a legitimate off work orders, you have no policy, you are violating Department policy, and you have no past practice to stand on that would allow you to ask for that specific issue. I can't believe the extent of illegality that you are extending yourself to. You are overextending yourself in this situation. You are issuing illegal orders and you have no policy under which you can compel him to do that. You have no right to do that, you have legitimate off work orders. You have enough right now that any other employee in the Department has submitted and [41] nobody has ever asked for more than that. You are violating past practice. You are violating Department policy, you are violating California law.

SF What California law are we violating?

SA HIPPA protections.

SF To require medical documentation when someone is off?

SA Yes, yes. You have competent medical documentation from Kaiser indicating he is off work and who cares what the reason is. I tell you what, we are going to give you a minute because we are going to go out and talk and you talk to these guys and you see if they want to issue the order.

SF We will take a break. It is 11:35.

SA I suggest that on the 18th a series of threatened orders that were made toward Delia; one, he was ordered to go to his house and have a Chief follow him home and bring items of his personal property, four rolls of fiberglass, and 2 2x4s and a plank of plywood. Am I correct Mr. Filarsky?

SF That is correct.

SA He was ordered to bring that out of his house. We object -- that is an illegal order. My question to Randy Ammons, President of the Association -- has there been any meet and confer on the issue of searching people's residence or compelling them to bring items of their personal property Randy.

SF Excuse me. Mr. Adams --.

SA Additionally the other order that was threatened was that he was ordered to bring in a *doctor's note to identify* a *treatment for* an underlying, private condition, which I objected to in a timely fashion. He is [42] ordered to bring a doctor's note that indicates what the procedure was. It is our position that there is a position in the MOU that says if an employee has been off duty due to an extended illness or injury (extended means 11 working days or more for a 40 hour work personnel or 7 more shifts for a 56 hour personnel).

Were you off for seven shifts Nick; seven or more?

ND Not calling in sick.

SF From August 10 on.

SA From the procedure.

ND Oh from the procedure.

SA Not from the dizziness, not from the --.

ND No.

SA So Randy, has there been any change to the MOU Article 45 regarding physical examinations or doctors certificates?

RA No.

SA Has anybody met and conferred with you on that?

RA No.

SA Alright, are you guys going to put that order in writing?

SF We are going to put it on the record; once these gentlemen leave we finish our interview.

SA Are you going to put it in writing?

SF We will put it in writing.

SA Will we have time to comply with it in more than just one day?

[43] SF You will have until Wednesday at 5:00.

SA On both orders?

SF No, the follow home is right now. The follow home is going to be right after we conclude this interview.

SA Randy, have you ever heard of that in the history of the Department since you have been here?

RA Never.

SA Somebody followed home and ordered to bring items of their property out of there.

RA Personal property, no.

SA Okay.

RA Department property, yes.

SA Okay, but not personal property. Alright. The union is saying that they don't want to meet and confer on either order is that correct?

RA There is nothing to talk about on this issue; it is clearly stated in the MOU.

SF The union is requesting the orders in writing?

RA Absolutely.

SA Alright, thank you. I will be out in just a second.

SF Let's continue on with the interview Mr. Delia. I have asked you earlier about the September

6 employee time off that you called in for flu; do you recall being asked about that?

ND Yes sir I do.

[44] SF Did you also call in September 8 and indicate flu?

ND Yes I did.

SF Did you have flu?

ND Like I described earlier I had that procedure done and was still feeling the [e]ffects of that procedure, so rather than saying an embarrassing comment, which I felt was personally embarrassing to me, I elected to say flu.

SF Who did you report that to?

ND The on duty Captain that morning. I think it was B shift. What day was that again?

SF September 8.

ND First thing in the morning around 6:30 a.m.

SF Did you go back to see the doctor as any follow-up for your August 29 procedure?

ND Like I said I was supposed to go this morning, but ordered me to be here, so I had to cancel that appointment, and I have not rescheduled it yet.

SF That was the doctor responsible for that particular procedure?

ND Yes that happened on the 29th after my appointment with my regular physician.

SF Again, what was the name of that particular doctor?

ND I believe his name is --.

SA We are objecting to any questions on this field, because it is confidential medical information, and at this stage I am not instructing him to not answer.

ND Dr. M. Goban (?).

[45] SF There had been some discussion before we took our last break about the City's authority with respect to sick leave. Here is a section of the operations manual for the Rialto Eire Department, Chapter 4, Subject 3. It was revised on March 6, 2006 or approved I guess.

On the last page it says, "The Rialto City Policy Manual, Chapter 8 should also be considered when dealing with sick leave issues."

Then we went ahead and pulled Chapter 8 of the Policy Manual, and I will provide a copy of that to you and your counsel at the present time.

Before I get into the specifics of the order, if you will, or the request or whatever you want to call it at this point in time, I want to take a moment to explain to you and to your counsel the underlying reason or rationale that we are going through this. You can agree or disagree; it is ultimately up to you.

Since we are creating this record here, if you will, I want to make sure that the record is clear why we are doing this.

Let's deal with the building materials first. You have a situation where you are off duty, you are obviously being surveiled, there is obviously video tape taken of you purchasing building materials. We already know that there is a remodeling or building project going on inside your house.

A cynical person might believe that while you are off duty you are engaged in those activities utilizing those building materials. You have told us today that while you purchased the materials, the materials were [46] not used in the building process and that are where you left them.

ND That is correct.

SF I have no reason to disbelieve that, however, a skeptical or cynical view would be you are not telling the truth. We have already gone through a situation, you and I, where in a prior investigation during a prior interview the Department alleged that you did not initially tell the truth.

The easiest way to verify your story is to see the building materials, because if we see the building materials the conclusion is Nick Delia was truthful; he didn't misuse his leave; he wasn't engaged in the remodeling project during the course of his time off.

Our purpose here in viewing the building materials is not to hang you but to clear you. You may not understand it or you may not agree, but that is why we want to see the building materials, because we can go back and can say, Nick Delia didn't lie during the investigation, he was truthful, he produced the building materials as a. consequence we are not going to allege that he was misusing his leave time. That is the building material issue.

Let's deal with the other two issues. The issue of what we will call the procedure, the hemorrhoid procedure that took place on August 29. I think everybody in here can understand how that could be embarrassing, difficult to deal with, whatever the case may be, and a reluctance to go around and advertise that as being the reason that I was absent.

But, you did indicate on two different occasions that you had the flu. You also indicated that those reasons are not true. On the one hand, I guess we could say time out, right now he had admitted to untruthfulness, and we can charge him with [47] misusing sick leave. On the other hand, we could take the position that under the circumstances it is understandable, we just have to be sure that in fact he underwent the procedure on August 29. Once we know about that, then we will go ahead and accept the fact that Nick was too embarrassed to reference that and that is why he put flue down. Again, not attempting to hang you, attempting, if you will, to clear you.

On the third issue. You were surveiled over a number of days from August 17 on. If you look at the video to the average person, you look healthy and no problems at all. All we are looking for is for a doctor to say, during that period of time from August 10 until September 3, when you got a release, that, you were unable to perform your duties as a Rialto Firefighter.

Then we don't have a situation of somebody saying, the guy was paid, he was out running errands, he was going to Lowe's, he was doing this and that. Why are we paying him if he can't do his duties. Again, trying to clear you rather than hang you.

That is the underlying basis for this.

Again, I don't know whether it changes you[r] mind at all, but we are looking to tie this up so to speak and perhaps get you back to work as soon as possible. I am telling you right now, on the record, that if the Chief goes out there and sees the building material, that is a nonissue.

If a doctor gives us a note saying the surgical procedure precluded you from coming to work on such and such a day, that clears you. If the doctor says he was under my care and unable to perform the duties of a Firefighter, that clears you. End of story.

That is all we are trying to do. We are trying to bring closure to this.

[48] SA May I respond. First, I take and I start with Mr. Filarsky's words, "I have no reason to disbelieve you." Let's translate that. We are looking at two constitutional rights and privacy rights that law holds in the highest level of protection. One, a man's home. The highest level of protection. Do you

know that it is an illegal search to your trash can in front of your house without a search warrant?

SF I know it is illegal for the cops to do that.

SA Do you know it is illegal to do that, even if your trashcan is sitting outside your house. That is how sacrosanct hold the constitutional right to be free of unreasonable search and seizure your house. That is why we don't you following him home and going into his house.

SF We are not asking to go into his house.

SA You started there and now you want him to go out and bring personal items. We don't care if you want to clear him or not. You are asking to go into the most private sanctuary that a man has, and that is a high level constitutional right and you have no authority and no right to go into it, because if you start here, who knows where you end?

This association will not stand for unwarranted intrusions however they come. You say you have no reason to disbelieve him. There is nothing on the videotape that gives you any basis to disbelieve him. He is not doing anything on that videotape that anybody else couldn't do given the same medical conditions that he has.

A doctor looking at these video tapes would look at that and say, he is not acting anyway inconsistent with any restrictions I have ever given him. Give me my check and stop wasting my time, first of all.

[49] Second of all, the MOU on the sick leave supersedes these policies. The MOU has a specific provision of when he has to bring medical documentation. This is superseded; this documentation, this Chapter 8, all this stuff is superseded by the MOU.

Additionally you have competent medical documentation saying he is off. You have all the documentation you need to make a determination that he was under a doctor's care and was in fact taken off work. You have got them, they were faxed over, yo[u] are not disputing their veracity, you are not disputing their legitimacy. He has already submitted to you the documentation as he needs to under the law and under the MOU to submit to you.

You are asking for private medical information on information where you have not reason to disbelieve him. You have no legitimate basis to go in any further than your level of inquiry right now. Additionally, the videos show nothing. How can you tell he is healthy, just because he is walking around? Anemic people walk around, people with surgical procedures walk around. You don't have him doing anything that is inconsistent with any possible concept. You have no probable cause, no legal basis, no reasonable suspicion, no basis whatsoever to invade his house or his body.

We have an MOU provision. He did not miss 11 shifts, you don't have the right to ask him for anymore documentation that you already got. He has been released to full duty. He should be put back to duty. You are not allowed to go into his house, you are not allowed to order -- you can't circumvent the 4th Amendment by ordering him to go into his house and bring the items out.

You can't do that. That is illegal and we will sue the Department for it. We are going to, and we will seek any and all damages [50] including individual liability. I hope you advise them that in a civil rights case supervisors can be individually liable. It means the Department doesn't pick up the tab, it means they pay. I hope you told them that because we are coming if you order this, not you, if they order it, we are coming if you order this.

We are not putting up with this, not putting up with this. You have no information on this guy other than he was ill; anemia and a private medical condition. You guys bring him into this because you can't read an illegible fax; because you think you got him off when he is not supposed to be off; and all of the sudden there goes the wind out of your sa[i]ls, because he has legitimate documentation taking him off. You guys make a mistake and you put it at issue, that is not our fault, that is your fault. You want to violate his rights, you want to violate the constitution, you want violate the MOU, you want to violate HIPPA.

You guys can't release information on your patients that you transport. You know that, and you are going to take away his rights?

SF If you are done we will go ahead and create the written order.

SA We want to see the written order; we want to see it in writing so it is specific and we know exactly what we are going to do, and we will wait right here while you write it.

SF You can step outside, confer with your Board, and we will draft the order and when we are ready we will call you back in.

SA Very good and make sure the spelling is clear so we know who to sue.

SF It is about 11:44.

It is about ten to two. We are back on the record. We have had a rather lengthy break. [51] During the break the Department has prepared an order in writing. Here is the original of the order that I will give to Mr. Delia with a copy to Mr. Adams. I will give you the opportunity review that. If you have any questions then we can respond.

SA I disagree with the characterization of the [inaudible]; it is false.

Okay. It is our position the MOU supersedes the City Rules.

Okay, I have read it.

SF Any questions about what we are asking for?

SA You put it in quotes so what if the doctor won't issue that?

SF I guess there has to be an explanation as to why the doctor won't issue it. If it is not in the very precise language that is there, but close enough for government work so to speak, then that is adequate. We are not asking for the underlying reason, we are just asking for the certification.

SA It is due by?

SF Wednesday 5:00.

SA Okay and the other order, are we still going to his house?

SF The Chiefs will follow him when we are done here, following Mr. Delia out to Rancho to his house.

SA Can we have that order?

SF That is the first paragraph.

SA Okay, I was --.

ND The second part of the first paragraph.

[52] SF Just the four bundles of fiberglass. As I understand it is packaged and sitting in the kitchen and easily accessible. That is all we are asking for.

SA Any further questions?

ND I have one question.

SF Yes sir.

ND The letter from the physician is that by mail or facsimile. It doesn't specify.

SA However it gets there it has to be there by 5:00.

SF If you get a copy for instance and you are at your residence or something and you can only fax it in that afternoon, then fax it in, but we would like it followed up with the original that is provided by the doctor.

If there is some reason that Dr. Jones is on an extensive vacation and can't provide that, then contact me through your attorney and we will deal with it then.

ND Okay.

SF Anything else before we conclude?

SA No. Are we going to go forthwith to his house?

SF I think the plan is to go forthwith so to speak.

SA I am going to accompany him, so we will meet you guys over there, or do you want to follow us.

SF I think the best way is to have them follow you. I am not sure where you are both parked, but you can make arrangements.

SA Our the apparatus bay in the back, in that lot over there.

[53] ND Next to Human Resources.

SF We will turn off the tape at about 7 minutes to 2:00. Thank you.

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and Frank Bekker

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NICHOLAS B. DELIA, *Plaintiff,* v.	Case No. CV 08-3359 R (PLAx)
CITY OF RIALTO, A Public Entity; CITY OF RIALTO FIRE DEPARTMENT A Public Agency; STEPHEN C. WELLS, Individually and as the Fire Chief for the City of Rialto; MIKE PEEL, Individually and as a Battalion Chief for the	**DECLARATION OF STEPHEN C. WELLS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT**

City of Rialto, FRANK BEKKER, Individually and as a Battalion Chief for the City of Rialto; STEVE A. FILARSKY, Individually and as an Internal Affairs Investigator for the City of Rialto; and DOES 1 THROUGH 10 INCLUSIVE,

Defendants.

Filed Concurrently with:

1. Notice of Motion and Motion for Summary Judgment;
2. Memorandum of Points and Authorities in Support of Motion;
3. Proposed Statement of Uncontroverted Facts and Conclusions of Law;
4. Declaration of Frank Bekker;
5. Declaration of Mike Peel;
6. Declaration of Howard B. Golds;
7. Request for Judicial Notice;
8. Proposed Judgment

Date: February 2, 2009
Time: 10:00 a.m.
Dept.: 8

DECLARATION OF STEPHEN C. WELLS

I, Stephen C. Wells, declare as follows:

1. I am the former Fire Chief of the City of Rialto Fire Department. I joined the City of Rialto Fire Department in 1975 and retired on July 17, 2008. The matters set forth in this declaration are within my firsthand knowledge and I would be so competent to testify.

2. The plaintiff in this litigation, Nicholas Delia ("Delia") is a firefighter employed by the Rialto Fire Department. Until about May 2006, Delia held of the rank of Engineer. However, at that time, he was demoted to the rank of Firefighter because of an unrelated personnel incident.

3. In approximately August 2006, Delia went out on medical leave after apparently becoming ill while on duty. Members of the City's administration as well as I became concerned at that time that Delia's claim of medical leave might not be valid. We were concerned because Delia was at the time appealing his demotion and was therefore involved in a contentious labor dispute with the City. Based thereon, the City hired a private investigation company to investigate Delia. As part of that investigation, Delia was filmed at various locations including on one occasion when he went to a Lowe's home improvement store and purchased various building materials including rolls of fiberglass building insulation. At that time other members of City administration and I became concerned that Delia was doing remodeling work on his home at a

time when he was claiming to be too ill to come to work.

4. Based upon the evidence that the private investigation company uncovered, it was decided that the Fire Department would conduct a formal internal affairs investigation of Delia. In consultation with other members of City administration, we decided that the investigation would be conducted by Steve Filarsky ("Filarsky"). Mr. Filarsky is a private attorney who for a number of years prior to the incident at issue in this litigation has represented the City in labor litigation, labor arbitrations, union negotiations and had also rendered legal advice on City personnel matters to both myself and other members of the City's administration. Mr. Filarsky had previously conducted internal affairs investigations for the City so turning the investigation over to him was a routine decision.

5. I was aware of the fact that Mr. Filarsky was conducting an interview of Delia as part of the internal affairs investigation on September 18, 2006. At no time did I participate in the actual interview. I was aware that both Battalion Chief Mike Peel ("Peel") and Battalion Chief Frank Bekker ("Bekker") also sat in on the interview, although they were not there for any particular purpose other than to witness what occurred.

6. At some point during the morning of September 18, 2006, Mr. Filarsky came to my office and we had a short conversation. During that conversation, he generally informed me that Delia

was taking the position that although he had purchased building materials at Lowe's, those materials had not been installed. Mr. Filarsky believed that if this fact were true, it would generally exonerate Delia of the charges that were the basis for the internal affairs investigation. Mr. Filarsky suggested that he ask Delia to produce the fiberglass insulation and if Delia refused, that Mr. Filarsky order him to show the insulation. At that time, I had no understanding that it was not legal for the City to order Delia to produce the fiberglass insulation. My best recollection is that Mr. Filarsky indicated this was something that could be done and based upon his legal advice, I agreed to allow the order to be given.

7. At some point thereafter, I recall being in a conversation where Battalion Chiefs Peel and Bekker and Mr. Filarsky were present. One of the Battalion Chiefs, and I do not recall which one, asked Mr. Filarsky if they would be in legal trouble based on the order to Delia to display the fiberglass insulation. Apparently, Delia's attorney had threatened them with some sort of legal action during the interview. I recall Mr. Filarsky assuring them that everything that had been done was legal and that they would not face any civil liability or any other legal problems as a result of what had occurred.

8. Attached to this Declaration as Exhibit "B" is a true and correct copy of a letter I signed on September 18, 2006, which among other things ordered Delia to produce for inspection the fiberglass building insulation. I did not draft this letter. I believe I was told by Mr. Filarsky that Delia's attorney had demanded that the order regarding the

showing of the insulation be put in writing and I believe Mr. Filarsky then drafted this correspondence. Mr. Filarsky asked me to sign the correspondence, which I did.

9. My understanding is that Battalion Chiefs Peel and Bekker subsequently went to Delia's house at which time Delia displayed the fiberglass insulation at issue.

10. I am not responsible for setting policy within the City of Rialto or setting policy within the Fire Department of the City of Rialto. That responsibility rests solely with the Rialto City Council. My duties as Fire Chief were delineated in Rialto Municipal Code section 2.34.040. As explained in that section, I did not have the authority to and in fact did not act as a final policymaker for the City. I recommend policies to the City Council and implemented policies enacted by the Council as so directed.

11. Although I did not verbally order Delia to produce the fiberglass building insulation, I did give Mr. Filarsky permission to give such an order to Delia. I did that because Mr. Filarsky recommended that I do so and because I saw no reason for such an order not to be given. Although. I generally had a belief that the City could not simply enter Delia's house, I did not understand there was a reason that the City could not order Delia to take property from his house like building insulation and display it to City employees.

I declare under penalty of perjury the foregoing is true and correct.

Executed on this 8th day of January, 2009 at Nipomo, California.

/s/ Stephen C. Wells
Stephen C. Wells

[SEAL] CITY OF RIALTO FIRE DEPARTMENT

September 18, 2006

Nick Delia
Firefighter/Paramedic
Rialto Fire Department

Firefighter/Paramedic Delia:

On August 18, 2006, you were videotaped purchasing and loading plywood, 2 x 4s, and insulation at Lowe's Home Improvement Center. On September 18, 2006, you indicated you did not use the materials in a home remodeling project; the materials remain unused at your residence. At the conclusion of your interview you are ordered to return to your residence and bring from your residence the four (4) packaged bundles of fiberglass insulation depicted in the videotape and show them, outside of your residence, to Battalion Chiefs Mike Peel and Frank Bekker.

On August 10, 2006, you went off duty with an injury/illness. You were absent from work on the following shifts:

August 12
August 17
August 19
August 21
August 26
August 28
August 30
September 4 (pre-approved vacation day)

September 6 (you called in sick with the "flu"; you admitted on September 18, 2006 that this statement was false).
September 8 (you called in sick with the "flu"; you admitted on September 18, 2006 that this statement was false).

Article 45 of the M.O.U provides in part: "If an employee has been off duty due to an extended illness or injury (extended means 11 working days or more for 40-hour per week personnel or 7 or more shifts for 56-hour per week personnel), he/she will be required to submit a return to work authorization from his/her physician."

Rialto Fire Department Operations Manual, Chapter 4, Subject 3 provides in part:

> "9. The Rialto City Policy manual, Chapter 8, should also be considered when dealing with sick leave issues."

Section 8.7.3 of the City's Personnel Rules provides in part:

> "Satisfactory evidence of a valid use of sick leave is required before any sick leave request may be approved. It is the responsibility of the employee's supervisor or department head to determine that the reasons given for the sick leave requested are valid, reasonable and justified."

* * *

> "b. For an absence of more than two days, the employee may be required to file a physician's certificate with a release to return to work or other evidence of illness stating the cause of the absence before such leave with pay will be granted."
>
> * * *
>
> "d. A supervisor may require a doctor's certificate or other verification of illness for every sick leave absence, regardless of length, if it appears the employee is using sick leave improperly and/or extensively, and discussions with the employee have shown no positive result."

As a result of your absence, you are ordered to provide the following documentation from your physician:

> A. "Nick Delia was under my medical care from August 10, 2006 to September 3, 2006, and was unable to perform the duties of a Firefighter with the City of Rialto."
>
> B. "Nick Delia underwent a medical procedure on August 29, 2006 and was unable to perform the duties of a Firefighter on August 30, 2006, September 6, 2006 and September 8, 2006."

The above documentation shall be signed by a physician and shall be submitted by 5:00 p.m. Wednesday, September 20, 2006 to my office.

/s/ Stephen C. Wells
Stephen C. Wells
Fire Chief

Cc: Human Resources
Fire personnel file

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NICHOLAS B. DELIA, *Plaintiff,* v.	CASE NO. CV 08-3359 R-PLA
CITY OF RIALTO, A Public Entity; CITY OF RIALTO FIRE DEPARTMENT A Public Agency; **STEPHEN C. WELLS, Individually and as the Fire Chief for the City of Rialto; MIKE PEEL, Individually and as a Battalion Chief for the City of Rialto, FRANK BEKKER, Individually and as a Battalion Chief for the City of Rialto; STEVE A. FILARSKY, Individually and as an Internal Affairs Investigator for the City of Rialto; and DOES 1 THROUGH 10. INCLUSIVE;** *Defendants.*	CASE NO. CV 08-3359 R (PLAx)

DEPOSITION OF STEVE ALAN FILARSKY
Wednesday, January 14, 2009
Reported by: Brandy L. Williams, CSR #11084

* * *

[23] BY MR. BANSAL:

Q. When you're requested to do an investigation by the City, do they lay out any parameters for you in terms of what you can and cannot do?

A. I'm not aware of any such parameters being laid out in the past.

Q. Of course, during an investigation, have you ever sought permission to enter the home of an individual, from the individual being investigated?

A. To enter the home?

Q. Yes.

A. No.

Q. Can you tell me who was present at the onset of the interview of Mr. Delia?

MR. TISDALE: Which one?

MR. BANSAL: September 18th, 2006.

THE WITNESS: I believe Battalion Chief Bekker, Battalion Chief Peel, myself, Mr. Delia, Mr. Delia's legal counsel, Stewart Adams.

BY MR. BANSAL:

Q. Were there any other individuals, at any other time, present during the interview?

A. At some point in time, we took a break, and a number of persons from the union board came in to the interview.

* * *

[28] working on his kitchen while he was on sick leave was for him to produce a bundle of insulation.

Q. Did you -

A. There was also discussion that Delia had previously lied to me and to the department and that this was a way for Delia to exonerate himself from lying during this investigation.

Q. Did you suspect him of lying in this investigation?

A. Absolutely.

Q. Would you please turn to Page 44.

A. Okay.

Q. And review Lines 9 through 16.

A. Okay. Reviewed it.

Q. Okay.

MR. TISDALE: Nine through what?

MR. BANSAL: Nine through 16.

Q. On Line 16, you state -- in regard to his possession of the building materials, not having used them, you state, "I have no reason to disbelieve that."

A. Correct.

Q. Yet, you just stated that you absolutely believed he was lying.

A. No. You asked me if I suspected he was lying as part of the investigation. You didn't ask me if I [29] believed. I did suspect him of lying as part of the investigation.

Q. What exactly did your suspicion entail?

A. My suspicion entailed the fact that he had previously lied to me about a very simple matter that was literally black and white.

Q. Did you suspect him of lying in this investigation?

A. I had a suspicion that he could be lying.

Q. Do you know why you said then, "I have no reason to disbelieve"?

A. In order to engender cooperation from Mr. Delia, in order to clear him once and for all so that that suspicion could be allayed.

Q. Your suspicion?

A. Not only my suspicion, but the suspicion of the chiefs that were involved.

Q. Did Bekker and Peel state that they were suspicious that he was lying?

A. I don't recall a specific statement by either one during the interview that they believed he was lying.

Q. Do you know why they were present during the interview?

A. Sure.

* * *

[32] A. Okay.

Q. This appears to be the time where you offer your suggestion of having Chief Peel follow Delia to his residence and have him access to view the building materials.

A. Correct.

Q. Why Chief Peel?

A. I'm not sure why it was Peel versus Bekker. It's possible that one of them was on duty and one of them was off duty during the time. I don't recall.

Q. Was a designation of a person discussed during the break?

A. I don't recall any such discussion.

Q. So it appears you first asked him, Mr. Delia, to voluntarily comply with having his house searched?

MR. TISDALE: That's a misstatement of the evidence. It completely misstates the record and Mr. Filarsky's testimony. There's no foundation. Nobody said anything about search of the house.

BY MR. BANSAL:

Q. What did you intend for when you suggested that Chief Peel follow him home and have access to the building materials?

A. What I intended was that Delia drive home, walk into his kitchen without any department personnel [33] present, grab a bundle of insulation, which we'd already seen in the video and which we'd shown Mr. Delia during the interview, have him bring it out and show Peel that, "Here, it's still here. I wasn't working on my kitchen while I was sick." End of story.

Q. Did you first attempt to get Mr. Delia's voluntary consent to that idea?

A. I asked him if he would voluntarily consent.

Q. What do you remember his response being?

A. His response wasn't anything. His counsel was -- his advice was not to do it.

Q. Did his counsel raise multiple objections to your idea?

A. His counsel raised multiple objections.

Q. Do you recollect what you thought of those objections?

A. Yes.

Q. What did you think?

A. I thought that Mr. Adams and myself had a history of Mr. Adams raising objections to other issues in the past, and I considered the source of those objections and who they were coming from.

Q. Did you contemplate the actual legal argument Mr. Adams was making?

A. I have no idea what you mean by "contemplate [34] the actual legal argument."

Q. Did you focus solely on the source of the objections as opposed to objectively listening to what he had to say?

A. I considered both the source of the objection and his statement regarding the objection.

Q. Do you recollect what your thoughts were of the statement regarding the objection?

A. Sure.

Q. What's that?

A. My thoughts were that we weren't conducting a search, that we weren't entering his house, that we were merely asking him to display materials which he'd identified which he already placed in his kitchen and which would have exonerated him completely in this investigation.

Q. If you could turn your attention to Page 37, please.

A. Which line, Sir?

Q. Let's see here. Give me one second. I marked it down wrong. Sorry. It starts off on Page 36, Line 45. It goes from 45 to Line 3 on Page 37. If you could please review that.

A. Okay.

Q. Do you recollect Mr. Adams raising the

* * *

[36] BY MR. BANSAL:

Q. So your response to Mr. Adams, "I will have the authority after I describe the order. We'll issue the order from the department so that you fully understand it."

A. Which line are you on, Sir? Which page?

Q. Line 1 through 3, Page 37.

MR. TISDALE: Okay. You just read from the transcript.

Do you have a question?

MR. BANSAL: Right. I'm just making sure he's done reading it.

THE WITNESS: Okay. I've read it.

BY MR. BANSAL:

Q. Okay. What did you mean by, "I will have the authority after I describe the order"?

A. That was the department issuing the order to Mr. Delia to provide the medical information.

Q. Did you believe you needed anybody to sign off on that order?

A. I believed that, as the department investigator, I did not have the authority to issue the order. The order had to come from somebody on fire command staff since I was not an employee of the fire department, just as a command staff member had to order

* * *

[39] when you use the term "issue" under these circumstances, it's vague, it's ambiguous, it's confusing.

BY MR. BANSAL:

Q. Have you ever been involved in a situation where departments issue an order similar to that as Mr. Delia received?

A. Which part of the order are you referring to? The request for medical information or

Q. The request for the personal items.

A. Are you describing the building insulation as, quote, "personal items"?

Q. Correct. They're his items; correct?

A. I believe so.

Q. Personal items?

MR. TISDALE: We don't have any reason to believe he didn't pay for them.

BY MR. BANSAL:

Q. Did you believe they were City property?

A. No. I have requested people, during the course of an investigation, to provide items of a personal nature.

Q. Do you know how many times you made that request?

A. No sir.

Q. Ballpark figure?

[40] A. Would be in excess of a dozen.

Q. Have they always abided by the request voluntarily?

A. To the best of my knowledge, they have.

Q. Do you recollect any instance where they said, "no"?

A. Not offhand.

Q. Do you recollect any instance where you had to o to the department to have an order issued?

A. I don't recall any specific instances, but I believe that there have been instances where written orders have actually ultimately been issued by an affected department.

Q. I believe you've cleared this up to a large extent, but just so I'm entirely clear, did you believe you had the authority to issue an order to Mr. Delia to produce the insulation?

MR. TISDALE: Objection. It's vague and ambiguous as to what you mean by "issue." Do you mean convey the order as it was issued by fire command staff, or do you mean come up with the order all by himself?

MR. BANSAL: To not convey it, but to penalize him if he felt to abide by it.

MR. TISDALE: Objection. That's a totally different question without a foundation. I don't

* * *

[44] A. Because if indeed the insulation was there, then that corroborated his story that he did not work on his kitchen when he was sick; therefore, he

was not -- could not be disciplined for untruthfulness or violating sick leave.

Q. Why didn't you, to your knowledge, have an order that he produce the items?

MR. TISDALE: He just explained to you he didn't have the authority to issue the order. He asked him politely to produce it in support of the defense that your client offered.

THE WITNESS: Sir, going into the interview, we had no idea what Delia's story was. It was only during the interview that Delia said, "It's at home. It's in my kitchen. It was out in my driveway. It was out in my garage. It's still there." So we had no ability to foresee what Delia was going to say during that interview. Thus, we didn't produce an order.

BY MR. BANSAL:

Q. When you first suggested the idea, did you intend for Peel to enter Delia's house?

A. At no time did I ever intend for Peel or anyone else from the department to enter Delia's house.

Q. Do you recollect anybody voicing any concerns about Mr. -- about the production of the three rolls of

* * *

[46] A. With Bob Owen?

Q. Yes.

A. I don't recall.

Q. Did you share with him the idea of having an order issued by the department to go and have his property brought out from his house?

A. I believe I indicated that that was the direction we were taking.

Q. Do you recollect what Mr. Owen thought of that?

A. I don't recall him objecting or voicing any sort of concern with the direction that we were taking.

Q. What exactly did you and Mr. Owen discuss?

A. I don't recall exactly what we discussed.

Q. Just the gist?

A. The gist is, once again, doing the investigation, Delia's statement, the issue with the insulation, what we were proposing to do from the department's staff.

Q. Okay. And you said this occurred during the last break -

A. I believe -

Q. -- correct?

A. -- there was a very lengthy break that took place in which Delia, his legal counsel, members of the union board were out -- I believe they were in the back

* * *

[48] Q. Did you request Chief Wells to provide an order in writing?

A. I indicated to Chief Wells, at some point in time, the department would be providing -- or had to provide a written order.

Q. Who produced the order?

A. Steve Wells signed it.

Q. Did he type it?

A. I don't know who typed it.

Q. Did you type it?

A. I definitely did not type it.

Q. Do you remember anybody raising any concerns whatsoever during this third break about what was proposed to be done in terms of Mr. Delia going into his house and producing three rolls of insulation?

A. No.

Q. When you returned from the break, did you have an order in hand for Mr. Delia?

A. Yes, sir. At the top of Page 49, it says, "During the break, the department has prepared an order in writing."

Q. Did you give the order to Mr. Delia?

A. I gave it to him or to Mr. Adams. It looks like, "Here's the original I'll give to Mr. Delia with a copy to Mr. Adams."

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

NICHOLAS B. DELIA Plaintiff,	)	
	)	No. CV 08-3359 R
vs.	)	
CITY OF RIALTO, et al., Defendants.	)	

TRANSCRIPT OF PROCEEDINGS

THE HONORABLE MANUEL L. REAL, U.S. DISTRICT JUDGE PRESIDING

LOS ANGELES, CALIFORNIA

FEBRUARY 2, 2009

MOTION HEARING

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[3] MONDAY, FEBRUARY 2, 2009; 11:04 A.M.

THE CLERK: Calling Item 17, CV 08-3359, Nicholas B. Delia v. City of Rialto, et al.

Counsel, your appearances, please.

MR. TISDALE: Good morning, Your Honor. Jon Tisdale for defendant and moving party, Steve Filarsky.

MR. GOLDS: Good morning, Your Honor. Howard Golds on behalf of the other remaining moving defendants.

MR. BANSAL: Good morning, Your Honor. Sanjay Bansal on behalf of Plaintiff Nicholas Delia.

THE COURT: Counsel have anything to add to the documents which have been filed?

MR. BANSAL: No, Your Honor.

MR. TISDALE: Yes, Your Honor.

I'd like to point out that after these motions were filed approximately 10 days, 12 days ago, the United States Supreme Court addressed the issue of qualified immunity. The case is *Cordell Pearson v. Callahan*.

While it doesn't change the law of qualified immunity, it does extend to this Court the discretion to skip the first prong of the *Saucier v. Katz* test and go directly to whether or not the conduct is not clearly established that it was unlawful. Since it is so clear, we [4] think that this gives the Court discretion to go directly to that test.

And I would point out, secondly, that while the language of the *Cordell Pearson* case mirrors exactly what we think should take place here, the Court states, Because the unlawfulness of the officer's conduct in this case was not clearly established, petitioners are entitled to qualified immunity.

And, finally, in plaintiff's opposition brief, they cite the case of *Anderson v. Creighton*, which, actually, stands for the proposition that even if the acting officer made a mistake, as long as it's a reasonable mistake, he is qualifiedly immune.

Thank you, Your Honor.

MR. GOLDS: Nothing further, Your Honor.

THE COURT: All right. As to the City of Rialto, the evidence establishes that none of the individual defendants had final policy-making authority for Rialto for purposes of the conduct about which the plaintiff complains.

Plaintiff also provides no evidence of the longstanding -- of any longstanding practice or custom, or that an official with final policy-making authority ratified the conduct. There can, thus, be no *Monell* liability against Rialto.

Under California law and the absence of statutory [5] authority, a city charter determines whether an official is a final policy maker. Under Rialto Municipal Code, the fire chief is not a final policy maker. Rather, the fire chief is subject to the general supervision of the city administrator and manages the fire department subject to city council approval.

As to Defendants Wells, Peel, and Bekker, under the recent Supreme Court ruling of *Pearson v. Callahan*, Defendants Wells, Peel, and Bekker are entitled to qualified immunity as plaintiff has not shown a violation of a constitutional right.

Here the transcript of the interview and the written order itself establishes that Delia was not threatened with insubordination or termination if he did not comply. Moreover, it is undisputed that no defendant ever entered Delia's house.

Fire Chief Wells issued the order but did not attend the interview and was not at Delia's house.

Peel and Bekker were at the interview but did not issue the order. Moreover, they waited inside the vehicle at the curb and simply watched Delia bring the insulation out of his house. These facts do not give rise to any constitutional violation.

As to Defendant Filarsky, the evidence establishes that Filarsky's conduct did not result in the deprivation of [6] any constitutional right required -- as a required element for a 1983 claim. Filarsky's conduct consisted of conducting the interview, arguing with Delia's attorney, and consulting with Fire Chief Wells, who then issued the written order. Filarsky was not present at Delia's house, and at no point was Delia threatened with subordination or termination if he refused to comply with the order.

All right. The -- Counsel is to prepare the uncontroverted facts and the judgment in both cases - in all cases.

MR. TISDALE: Thank you, Your Honor.

THE COURT: The motion for summary judgment is granted as to --

MR. GOLDS: So I assume, Your Honor --

THE COURT: -- all defendants.

MR. GOLDS: -- the motion that is set for next week is off calendar.

THE COURT: Yes.

MR. GOLDS: Thank you, Your Honor.

MR. BANSAL: Thank you, Your Honor.

THE COURT: We'll take a ten-minute recess.

(Proceedings concluded at 11:09 a.m.)

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

No. 10-1018

In The
Supreme Court of the United States

STEVE A. FILARSKY,
Petitioner,

v.

NICHOLAS B. DELIA,
Respondent.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

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QUESTION PRESENTED

Whether a lawyer retained to work with government employees in conducting an internal affairs investigation is precluded from asserting qualified immunity solely because of his status as a "private" lawyer rather than a government employee.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-38) is reported at 621 F.3d 1069. The district court's opinion (Pet. App. 39-51) is not reported.

JURISDICTION

The court of appeals entered its judgment on September 9, 2010. Pet. App. 1. A timely petition for rehearing *en banc* was denied on November 8, 2010. *Id.* A timely petition for a writ of certiorari was filed on February 3, 2011, and the petition was granted by this Court on September 27, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

The text of 42 U.S.C. § 1983 is reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Factual Background

1. The City of Rialto, California has a population of approximately 99,000. *See* 2010 United States Census Bureau, City of Rialto, *available at* http://2010.census.gov/2010census/popmap/ipmtext.php?fl= 06:0660466. Many governmental positions, including that of the Mayor and City Council, are filled on either a part-time or volunteer basis. *See* Rialto City Council Members, http://www.ci.rialto.ca.us/citycouncil_council-members.php (mayor, mayor pro tem, and council members all part time). The City has no full-time legal staff. *See* League of Calif. Cities & Calif. State Ass'n of Counties, Cert. Amicus Br. 10 ("California Cities Cert. Amicus Br.").[1]

Respondent became a firefighter for the City in July 2000, and eventually rose to the rank of Engineer. Pet. App. 43. In June 2006, respondent was demoted for sending racially derogatory and pornographic emails. *Id.* at 43-44; J.A. 48-54, 69-73.

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[1] Eighty-five percent of all city mayors are part-time, as are the vast majority of local supervisors, commissioners, and council members. *See* FORMS OF LOCAL GOVERNMENT: A HANDBOOK ON CITY, COUNTY AND REGIONAL OPTIONS 5-7, 201 (1999) (Roger L. Kemp., ed.).

Two months later, on August 10, 2006, respondent complained that he was feeling ill while assisting in the control of a toxic spill. Pet. App. 5. Respondent then obtained a series of letters from his doctor that, while excusing him from work for successive shifts, did not place any other activity restrictions on him at all. *Id.* at 5-6. Because of those letters, he did not return to work until September 3, 2006. *Id.*

Given respondent's recent discipline, the City became suspicious of respondent's lengthy work absences, particularly given the omission of any activity restrictions imposed by the doctor. *See* Pet. App. 44. After respondent was seen during a work absence purchasing and loading home-renovation supplies like plywood, lumber, and fiberglass insulation, the City decided to commence an internal affairs investigation to determine whether he was "off-work on false pretenses." *Id.* at 6.

2. The City retained petitioner, Steve Filarsky, to assist with its internal affairs investigation. He was retained because he had 29 years of specialized experience as a labor, employment, and personnel-matters attorney with expertise in conducting internal affairs investigations. Pet. App. 59, 89; J.A. 156. His responsibilities were to provide legal analysis during the investigation, to propose disciplinary actions, and to participate in legal proceedings and hearings. Pet. App. 44-45, 59.

The City asked petitioner, as its legal counsel, to examine respondent. Pet. App. 6-7; *see also* J.A. 156-157. Also present at the interview were respondent's attorney and two Fire Battalion Chiefs. In addition, Fire Chief Stephen Wells was nearby in the building and consulted with petitioner. Pet. App. 7-8. When respondent was informed that he had been seen purchasing home-improvement materials on a sick-leave day, he admitted making the purchases, but asserted that he had not yet incorporated the materials in his home-improvement project and that the materials were stored unused at his residence. *Id.* at 7, 45.

Petitioner then "confer[red] with 'the Chiefs,'" Pet. App. 7, advising them that, if respondent were telling the truth and had not been conducting a home-remodeling product on sick days, the investigation should end without respondent suffering any disciplinary action, *id.* at 90-91. After Fire Chief Wells adopted the advice, *id.* at 91, petitioner informed respondent that, if he could produce the unused materials for inspection, he would be exonerated and the investigation would end, *id.* at 46. Petitioner and respondent's attorney then engaged in "a fairly heated dispute over whether an inspection would be allowed," and respondent's counsel threatened to sue both Fire Battalion Chiefs. *Id.* Petitioner stressed repeatedly that, to end the investigation, respondent need only verify his story by producing a sample of the unused materials to his supervisors outside of his house. *Id.* at 8, 61-63, 91-92; *see* J.A. 128-131, 142-145. Respondent continued to refuse. Pet. App. 8.

After consulting with petitioner, Chief Wells signed an order requiring respondent to produce a sample of the unused materials to his supervisors outside of his home. Pet. App. 46-47. Petitioner himself had no authority to sign that order. *Id.* at 92; *see* J.A. 134, 156-158. After obtaining the City Attorney's approval, petitioner conveyed the Fire Chief's order to respondent in the presence of his attorney and four union representatives who had been summoned to the interview by respondent's attorney. Pet. App. 93. Respondent "was not threatened with insubordination or termination if he did not comply with [the] order." *Id.* at 48.

While petitioner remained behind, the Battalion Chiefs followed respondent to his home, parked outside, and watched as he produced a sample of unused insulation. The supervisors departed immediately. The entire production process took one minute. Pet. App. 47-48. The City then terminated its investigation of respondent without subjecting him to any disciplinary action. *Id.*

B. Procedural History

1. Respondent filed suit under 42 U.S.C. § 1983 against the City, its Fire Department, the Fire Chief, both Battalion Chiefs, petitioner, and ten unnamed, unidentified individuals. J.A. 18-25. Respondent alleged that the order to produce the building materials for inspection violated his federal constitutional rights to privacy and to be free from unreasonable searches under the Fourth and Fourteenth Amendments. J.A. 19. Respondent's complaint identified petitioner as, "at all times relevant, an employee of the City of Rialto" and "an official policy-maker for the City." J.A. 21. The complaint further alleged that petitioner's actions

"represent actions by the municipality itself." J.A. 24. The complaint sought compensatory and punitive damages for the one-minute-long inspection, as well as attorneys' fees. J.A. 24-25.

The district court granted summary judgment and dismissed the suit. Pet. App. 39-51. The court held that all of the individual defendants, including petitioner, were entitled to qualified immunity because respondent failed to demonstrate any "violation of a clearly established constitutional right in that [respondent] was not threatened with insubordination or termination if he did not comply with any order given and none of these defendants entered plaintiffs house." *Id.* at 48.

2. The court of appeals affirmed in part and reversed in part. Pet. App. 1-38. The Ninth Circuit agreed that, under the circumstances, the order to respondent to briefly produce a sample of the building materials for inspection outside his home did not violate respondent's clearly established constitutional rights. *Id.* at 37. The court accordingly affirmed the dismissal of all the individual governmental defendants on qualified immunity grounds. *Id.* at 37-38.

The Ninth Circuit, however, held that petitioner alone must be denied summary judgment because, "as a private attorney," he categorically "[wa]s not entitled to qualified immunity." Pet. App. 25-26 (following *Gonzalez v. Spencer*, 336 F.3d 832, 834-835 (9th Cir. 2003)). The court of appeals also noted that, while petitioner's status as a privately retained attorney deprived him of qualified immunity, he could still be held liable for violating the Fourth and Fourteenth Amendments if he "act[ed] as [an] agent[] of the government." Pet. App. 27 n.6.

SUMMARY OF ARGUMENT

There can be no serious dispute that the conduct at issue here—legal advice rendered by a member of a governmental investigative team pursuing possible violations of law—falls within the heartland of the qualified immunity doctrine's protection. The conduct entails discretionary judgments made in close coordination with government employees as part of the execution of an essential governmental activity.

The only question is whether that traditional protection evaporates solely because the lawyer providing the legal advice is temporarily, rather than permanently, engaged by government officials, even though he works in close coordination with government officials and under their direction in performing governmental activities. Both history and reason answer that question "no."

Historically, the broad sweep of state and local governmental positions, particularly those discretionary decisionmaking positions traditionally filled by attorneys, were staffed by persons working jointly in the private and public sectors. There was no developed civil service in the mid-nineteenth century, so that commonly the full panoply of government officials—everyone from judges, to legislators, to prosecutors—combined public service with private occupations. That was especially necessary at the state and local levels of government, which lacked both the resources and consistent volume of work that would justify the full-time employment of legal staff.

Accordingly, eligibility for immunity turned not on a person's formal institution into a governmental position, but on whether the temporarily engaged private individual was the functional equivalent of a government employee, considering (i) the nature of the role performed or the service provided, (ii) the close supervision of or coordination with governmental officials, and (iii) the immunity that would have attached to government employees performing the same essential governmental task. Here, petitioner performed the same roles of legal advisor and representative that in-house lawyers routinely provide in larger governments and for which they are routinely accorded (at least) qualified immunity. Petitioner did so, moreover, by working in close coordination with government officials and under their direct supervision, as part of a seamless governmental investigatory team.

The extension of immunity in that context makes particular sense for attorneys because of their distinctive fiduciary obligation to serve zealously the best interests of their governmental clients. Retained attorneys, in other words, must make exactly the same type of client-focused judgments as in-house government lawyers, motivated exclusively by the best interests of the governmental client and the public that it serves, to the exclusion of personal interests.

The central justification for the immunity doctrine is to protect precisely such government-focused decisionmaking from being adversely influenced and contaminated by personal-liability concerns and the enormous distractions of personal-damages litigation. Because temporarily engaged attorneys make the exact same government-focused decisions as permanently engaged attorneys, the public interest requires that they equally come under the umbrella of qualified immunity. Otherwise, given the frequency with which Section 1983 actions are filed, private attorneys face the very real prospect of being left litigating alone and saddled with full responsibility for the entire damages judgment themselves, when all of the governmental employees with and for whom they worked are dismissed on immunity grounds. That risk, in turn, will drive attorneys away from accepting governmental representations, depriving state and local governments across the Nation of critically needed, affordable legal advice.

That result makes no sense at all. The whole *raison d'etre* of Section 1983 is to hold *government* officials responsible for improving government's compliance with the law. Contorting the statute into a liability scheme in which only *private* defendants are left holding the liability bag and governments are deprived of a central source of quality legal counsel would stand Section 1983 and its animating purpose on their heads. Both the public interest and taxpayers' wallets will suffer.

ARGUMENT

QUALIFIED IMMUNITY EXTENDS TO PRIVATE ATTORNEYS TEMPORARILY ENGAGED TO PERFORM ESSENTIAL PUBLIC-SERVICE REPRESENTATION IN CLOSE COORDINATION WITH AND UNDER THE DIRECT SUPERVISION OF GOVERNMENT EMPLOYEES

Section 1983 creates a private cause of action against persons who, "under color of [state law]," deprive another "of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983 (1996). This Court has repeatedly cautioned, however, that "the tort liability created by § 1983 cannot be understood in a historical vacuum." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981). Rather, "[o]ne important assumption underlying the Court's decisions in this area is that members of the 42d Congress" that enacted Section 1983 "were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary." *Id.*; *see also Briscoe v. LaHue*, 460 U.S. 325, 330 (1983) (Section 1983's "all-encompassing language" incorporates common-law immunities).

For that reason, this Court has repeatedly held that Section 1983's cause of action must "be read in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976).

Immunities that are "well grounded in history and reason" will shield or limit the liability of Section 1983 defendants. *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)).

There is no dispute that, as a general matter, the qualified immunity doctrine extends to the type of discretionary judgments made by governmental actors conducting an official investigation into potential wrongdoing that occurred here. *See Malley v. Briggs*, 475 U.S. 335 (1986) (immunity for law enforcement investigators); *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (immunity for Executive Branch officials engaged in investigative measures); *cf. Imbler*, 424 U.S. 409 (prosecutorial immunity). Indeed, the court of appeals agreed that all of the other defendants in the case were shielded from suit by immunity. Pet. App. 37-38.

The only question is whether petitioner, who worked hand in glove with his immune co-defendants with the same single-minded focus on governmental and public interests, should be selectively deprived of that qualified-immunity protection solely because he was temporarily, rather than permanently, engaged by the City. Both "history and reason," *Buckley*, 509 U.S. at 268, foreclose such artificial line drawing and, in fact, establish that private attorneys temporarily retained to provide legal services to the government are not categorically excluded from qualified immunity. When, as here, the nature of the attorney's role renders him the functional equivalent of a government employee, working in close coordination with and under the direct supervision of other public employees as an integral participant in essential governmental activities and decisionmaking, the retained attorney enjoys the protection of qualified immunity.

A. History Establishes That Qualified Immunity Shields Private Attorneys Temporarily Engaged To Provide Legal Counsel To The Government In The Execution Of Essential Public Duties

When private attorneys are temporarily engaged by government to provide counsel in the execution of the government's essential functions, the qualified immunity doctrine applies. The Ninth Circuit, however, categorically excluded retained private attorneys from the application of qualified immunity. Pet. App. 27. That categorical holding is wrong and defies both this Court's precedent and history.

1. Precedent Precludes a Categorical Line

When it comes to analyzing the application of qualified immunity to private individuals working for the government or enforcing public laws, this Court has foreclosed the very categorical line that the Ninth Circuit adopted. Instead, this Court has decided immunity cases involving private individuals narrowly and circumspectly.

In *Wyatt v. Cole*, 504 U.S. 158 (1992), this Court held that qualified immunity is not available to private litigants who invoke state replevin, garnishment, or attachment statutes, *id.* at 168-169. The Court stressed, however, that its decision was "a very narrow one," that turned on the "attenuated" "nexus between private parties and the historic purposes of qualified immunity," *id.* at 168, rather than any reflexively wooden barrier to extending qualified immunity to private individuals under any circumstances.

Underscoring that there is no categorical rule against extending immunity to individuals who conjoin public work with private employment, this Court extended qualified immunity to school board members in ***Wood v. Strickland***, 420 U.S. 308 (1975), even though, as the Court noted, "[m]ost of the school board members across the country receive little or no monetary compensation for their service," *id.* at 320 n.11 (citation omitted), and thus are not full-time government employees. Instead, the financial reality is that those school board members who enjoy the protection of qualified immunity, like a large percentage of individuals who fill state, county, municipal, and local governmental positions, must conduct their work for the government in combination with ongoing private employment. *See* National School Boards Ass'n, *School Boards Circa 2010: Governance in the Accountability Era* § 4, *available at* http://www.nsba.org/Board-Leadership/Surveys/School-Boards-Circa-2010/SBCirca10-Section4.pdf (nearly two thirds of school board members nationally report receiving no salary and only 2% receive more than $15,000 per year).

Finally, in *Richardson v. McKnight*, 521 U.S. 399 (1997), this Court held that independent-contractor, private prison guards were not shielded by qualified immunity in the absence of historical precedent or policy reasons for extending such protection, *id.* at

405-412. In so ruling, this Court stressed that it was deciding the question "narrowly, in the context in which it arose." *Id.* at 413. Importantly, the Court expressly left open the availability of immunity to private individuals "briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision." *Id.*

There thus has been nothing remotely categorical about this Court's immunity judgments in cases involving private individuals and, in fact, *Richardson* expressly left open the availability of qualified immunity to attorneys like petitioner who are retained to work in close coordination with government employees in the execution of essential governmental activities.

2. *History Documents the Extensive Conjunction of Private and Public Service*

The Ninth Circuit's categorical exclusion from qualified immunity of individuals who serve the government in a temporary or partial capacity not only ignores precedent, but also blinks away historical reality. The overwhelming evidence is that, at the time of Section 1983's enactment, a great percentage of governmental activities were performed by private individuals working on an interim basis for local and state governments. The small size of such governments, tight budget constraints, and the more limited role of government in daily life led to the absence of any extensive or formalized public service at the State or local level in the post-Civil

War era generally, and in particular in the employment of legal counsel. And history documents that immunity protections for such privately retained individuals were a "'firmly rooted' tradition." *Richardson*, 521 U.S. at 404. Indeed, "[u]pon this point a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

First, "[p]rivate organizations have been involved in public undertakings throughout history." John D. Donahue, THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS 34 (1989). The United States in the eighteenth and nineteenth centuries was no exception. Indeed, history documents an extensive "mixture of public and private means and ends in the administration of policies concerning such things as crime, health, education, and welfare." William J. Novak, "Public-Private Governance: A Historical Introduction," in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 31 (Jody Freeman & Martha Minow eds., 2009).

Much like local governments of the present day, their predecessors in the first century of the Republic could not financially justify employing a full-time contingent of in-house lawyers, so "government has long engaged in the practice of contracting with private lawyers to represent public interests" and to provide a wide range of legal services vital to the fulfillment of essential governmental activities. Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U. C. DAVIS L. REV. 411, 415 (2009).

Second, those privately assigned legal services included many functions generally considered "public" today—and routinely accorded qualified or absolute immunity—such as criminal prosecution. *See* "Public-Private Governance," *supra*, at 31 ("Private prosecution allowed for the wide distribution of the policing function—stretching capacity, spreading costs, and lessening the need for an expansive, professional bureaucracy"); *see also State v. Wilson*, 24 Kan. 189, 193 (1880) (because of the demands of the job and inability to "employ counsel at the public expense," "public justice sometimes requires that the public prosecutor shall have assistance, and that, too, when the assistance can only come from private sources").

Indeed, at the time Section 1983 was enacted, "there generally was no such thing as the modern public prosecutor." *Kalina v. Fletcher*, 522 U.S. 118, 132 (1997) (Scalia, J., concurring). Instead, "[u]p until the late nineteenth century, when the office of the public prosecutor developed, private lawyers regularly prosecuted criminal cases on behalf of both crime victims and the state." *Delegation of the Criminal Prosecution Function*, *supra*, at 413; *see also Kalina*, 522 U.S. at 124 n.11 (noting that "the office of the public prosecutor in its modern form" was not "common" before 1871).[2]

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[2] The prevailing practice in England was similar, with prosecutions predominantly conducted by private persons "into the nineteenth century." *See* John H. Langbein, *The Origins of*

Third, the Congress that enacted Section 1983 was acutely conscious of the dependence of the federal government on private attorneys. Less than one year before it passed Section 1983, Congress had created the United States Department of Justice to streamline the legal costs that had arisen as a result of different agencies' spending on private counsel. *See* Homer Cummings & Carl McFarland, FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE 218-229 (1937); *id.* at 224 (quoting contemporary newspaper account reporting that a bill establishing a government law department "would reduce the expenses of government by more than $100,000 a year").

Furthermore, the United States Attorney General himself had been expected to maintain simultaneously with his public service an active private law practice until 1853, when the position first became a full-time job. *See* Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 285 n.46 (1989); *see also* Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L. J. 561, 619 (1989).

Even federal judges could and did maintain their own legal practices before state courts until 1812. *See* James E. Pfander, *Judicial Compensation and*

Public Prosecution at Common Law, 17 AM. J. LEGAL HIST. 313, 317-318 (1973).

the Definition of Judicial Power in the Early Republic, 107 MICH. L. REV. 1, 23 (2008).

Fourth, this Nation has a great tradition of private attorneys stepping temporarily into public representations to answer the needs of their government. Many of the early Republic's most storied attorneys had exemplified the practice of joint private and public service. For example, John Marshall was a private lawyer when the Virginia General Assembly retained him to "examine [a dispute] and recommend a settlement" between the Commonwealth and Philadelphia merchant Simon Nathan arising out of Nathan's provision of military supplies during the Revolution. Jean Edward Smith, JOHN MARSHALL: DEFINER OF A NATION 109 (1996). Other governmental roles that Marshall performed while in private practice included those of the Richmond City Recorder, magistrate of the Richmond City Hustings Court, and Virginia's Acting Attorney General. *Id.* at 105, 163. And on an *ad hoc* basis, Marshall served on committees assessing the mental capacities of criminal defendants for the Governor of Virginia. *See* Leonard Baker, JOHN MARSHALL: A LIFE IN LAW 170-171 (1974).

Daniel Webster likewise was in private practice when he was retained to represent the Second Bank of the United States in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). That was not the only case in which Webster represented the government while practicing privately. *See, e.g.*, *Rhode Island v. Massachusetts*, 45 U.S. (4 How.) 591 (1846) (representing Massachusetts); *Mayor of New Orleans v. United States*, 35 U.S. (10 Pet.) 662 (1836) (representing New Orleans); *President of Cincinnati v. Lessee of White*, 31 U.S. (6 Pet.) 431 (1832) (representing Cincinnati).

Nor would it have been lost on those who enacted this post-Civil War legislation that the late President Abraham Lincoln himself had donned the hat of governmental representation while engaged in private law practice. He accepted an appointment as the Illinois State Attorney *pro tempore* in a number of criminal prosecutions. *See, e.g.*, *An Awful Crime and Speedy Punishment*, SPRINGFIELD DAILY REGISTER (May 14, 1853) ("A. Lincoln, esq. was appointed prosecutor" in a rape case, securing the defendant's conviction and an eighteen-year prison sentence as "[a] mob came very near getting possession of the base wretch and hanging him."). Lincoln also served as a judge *pro tempore* in several state cases when the regular circuit judge was conflicted or otherwise unavailable. *See* Harry E. Pratt, *"Judge" Abraham Lincoln*, 48 J. ILL. STATE HIST. SOC'Y 28 (Spring 1955). And in 1852, the Illinois General Assembly appointed Lincoln and his law partner to investigate and report on civil claims arising out of the construction of the Illinois and Michigan canal. *See* Letter from Aug. C. French, Gov. to Ill. H.R., *Transmitting the Report of the Comm'rs Appointed to Investigate Canal Claims* (Jan. 8, 1853).

It seems dubious that those who enacted Section 1983 to impose liability on *governmental* actors would have intended a scheme of immunities in which all the government officials would have been excused from the case with only a *private* attorney who temporarily stepped into governmental representation like Abraham Lincoln left holding the bag. That, however, is where the Ninth Circuit's categorical rule has left Section 1983 law.

Fifth, a critical consideration in the immunity inquiry is the legal environment that the "members of the 42d Congress" that enacted Section 1983 "were familiar with." *City of Newport*, 453 U.S. at 258. There is no question that those legislators would have been fully familiar with and acutely sensitive to the frequent employment of private attorneys by local and state governments to provide public legal services because they practiced that symbiotic relationship themselves. Representative Samuel Shellabarger, "the author and manager of the bill in the House," *Owen v. City of Independence*, 445 U.S. 622, 636 (1980), represented governmental entities before this Court while in private practice. *See, e.g.*, *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888) (representing Wisconsin); *California v. Central Pac. R.R. Co.*, 127 U.S. 1 (1888) (representing California); *Iowa v. McFarland*, 110 U.S. 471 (1884) (representing Iowa and Illinois); *Shields v. Ohio*, 95 U.S. 319 (1877) (representing Ohio). Congressional committees also retained Shellabarger to assist with investigations while he was in private practice. *See* William A. Kinnison, HON. SAMUEL SHELLABARGER: LAWYER, JURIST, LEGISLATOR 42 (1966).

Representative Benjamin F. Butler, another of the bill's "chief supporters" in the House, *City of Newport*, 453 U.S. at 265, had previously been "employed [while in private practice] by Mr. Speed, the Attorney General of the United States, to assist Mr. Stansbury in the argument of the case of

Milligan v. United States" before this Court. Benjamin F. Butler, AUTOBIOGRAPHY AND PERSONAL REMINISCENCES OF MAJOR-GENERAL BENJAMIN F. BUTLER 1007-1008 (1892); *see Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (Butler appearing for the United States as "special counsel").

Finally, Senator George F. Edmunds, who managed the Civil Rights Act in the Senate, *see Monell v. Department of Soc. Servs. of N.Y.*, 436 U.S. 658, 684 (1978), also represented government entities before this Court as part of his own private practice. *See, e.g.*, *Douglass v. County of Pike*, 101 U.S. 677 (1879) (representing Pike County); *Interstate Commerce Comm'n v. Alabama Midland Ry. Co.*, 168 U.S. 144 (1897) (representing federal agency); *O'Neil v. Vermont*, 144 U.S. 323 (1892) (representing Vermont); *Chicago v. G. T. Ry. Co. v. Wellman*, 143 U.S. 339 (1892) (representing Chicago).

3. Immunity Precedent Applied Equally to Private Attorneys Providing Governmental Representation

The dual roles that private attorneys commonly performed, moving fluidly between private practice and governmental representations, was reflected in the even-handed application of immunity principles to private attorneys performing governmental services in the nineteenth century. There certainly was no legal precedent for denying immunity solely because the attorney's engagement for public representation was temporary rather permanent.

a. Common law defenses available

To begin with, both private and public individuals were equally able to invoke the common law defenses of good faith and probable cause when sued for such torts as malicious prosecution or false imprisonment. *Compare Dinsman v. Wilkes*, 53 U.S. (12 How.) 390, 404-405 (1851) (naval captain not liable for false imprisonment absent proof of malice), *and Parker v. Huntington*, 68 Mass. (2 Gray) 124 (1854) (overruling demurrer to complaint for malicious prosecution by State's Attorney where malice and lack of probable cause were alleged), *with Barker v. Stetson*, 73 Mass. (7 Gray) 53, 54 (1856) (private parties not liable for securing a search warrant absent proof of both malice a lack of probable cause), *Carey v. Sheets*, 67 Ind. 375 (1879) (same), *Randall v. Henry*, 5 Stew. & P. 367, 378 (Ala. 1834) (private prosecutor was liable for instituting criminal proceedings maliciously and without probable cause), *Bell v. Keepers*, 14 P. 542, 543 (Kan. 1887) (same), and *Finn v. Frink*, 24 A. 851, 852-853 (Me. 1892) (same).

Courts have continued to evaluate immunity identically for public and private *prosecuting* attorneys, whether that immunity is absolute, *see Kalina*, 522 U.S. at 129, or qualified, *see Buckley*, 509 U.S. at 273 (qualified immunity for investigative functions); *Burns v. Reed*, 500 U.S. 478, 487 (1991) (qualified immunity for providing legal advice to police). *See Polzin v. Gage*, 636 F.3d 834, 838 (7th Cir. 2011); *Forste v. Hensley*, 405 F. App'x 94, 96 (8th Cir. 2010); *Voytko v. Ramada Inn*, 445 F. Supp. 315, 328 (D.N.J. 1978); *Rao v. State*, 425 N.Y.S.2d 888, 890 (N.Y. App. Div. 1980). Even the Ninth Circuit has done so, *Lacey v. Maricopa County*, 649 F.3d 1118, 1131 (9th Cir. 2011) (extending immunity to private attorney acting as special prosecutor on behalf of State), rendering that court's categorical exclusion of petitioner from immunity based on his "private" status here all the more inexplicable. *See also Richardson*, 521 U.S. at 418 (Scalia, J., dissenting) ("I think it highly unlikely that we would deny prosecutorial immunity to those private attorneys increasingly employed by various jurisdictions in this country to conduct high-visibility criminal prosecutions.").

Those common law defenses, of course, are the foundation on which this Court has grounded qualified immunity. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 815-819 (1982); *see also Malley*, 475 U.S. at 340-341; *Kalina*, 522 U.S. at 132-133 (Scalia, J., concurring).[3] Because the common law did not treat private individuals temporarily engaged by the government differently from those permanently engaged, neither should contemporary entitlement to the qualified immunity defense diverge on that basis.

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[3] The *Malley* court, in fact, specifically cited to *Barker*, *Carey*, *Randall*, and *Finn*, all of which involved private complaining witnesses, in determining the level of immunity accorded to a public officer sued in his capacity as a complaining witness. *Malley*, 475 U.S. at 341 n.3.

b. Judicial and quasi-judicial immunity applied

Courts in the 19th century did not apply the common law doctrines of judicial and quasi-judicial immunity differently based on whether an attorney carrying out quasi-judicial functions came from "private" employment to temporarily fill that governmental role or was, instead, a permanent governmental employee. Instead, the common law rule was that "[w]henever * * * the State confers judicial powers upon an individual, it confers them with full immunity from private suits" in order to ensure that "the officer [to whom] these duties are confided * * * exercise[s] his judgment fully, freely, and without favor * * * [or] fear." Thomas M. Cooley, A TREATISE ON THE LAW OF TORTS 477 (2d. ed. 1888). Judicial and quasi-judicial immunities were thus consistently accorded not only to "judges proper," *id.* at 479, but to any person, private or otherwise, performing any one of a wide variety of judicial and quasi-judicial functions including:

- justices of the peace, *see Pratt v. Gardner*, 56 Mass. (2 Cush.) 63, 70 (1848) (same immunity extends "to a justice of the peace as to any other judicial officer"); *Reardon v. Russell*, 75 Mass. (9 Gray) 366, 366-367 (1857) (citing statute prohibiting justices of the peace from being employed only by clients who had previously appeared before them); *Coleman v. Roberts*, 21 So. 449, 450 (Ala. 1896) (ex officio justice of the peace was immune to same extent as any judicial officer); *Pruitt v. Armstrong*, 56 Ala. 306, 307 (1876) (analogizing justice of the peace to a "private agent," as distinguished from a sheriff);

- witnesses "governmental or otherwise" who testify in court proceedings, ***Briscoe***, 460 U.S. at 335;
- arbitrators to private disputes, *see* Cooley, *supra* at 480; *accord **Burns***, 500 U.S. at 500 (Scalia, J., concurring) ("As is evident from the foregoing catalog, judicial immunity extended not only to public officials but also to private citizens (in particular jurors and arbitrators)"); *Jones v. Brown*, 6 N.W. 140, 142 (Iowa 1880) (arbitrators hired by plaintiffs were immune because they were "in a certain sense a court");
- grand and petit jurors in their deliberations, *see* Cooley, *supra* at 479; *Turpen v. Booth*, 56 Cal. 65, 67 (1880);
- notaries public, *see Henderson v. Smith*, 26 W. Va. 829 (1885) (superseded by statute in 1985 as stated in *Galloway v. Cinello*, 188 W. Va. 266, 271-272 (1992)); *First Nat'l Bank of Broadway, Va. v. Cootes*, 81 S.E. 844, 845 (W. Va. 1914) (notary public was cashier of private bank); and
- architects and engineers acting in a judicial capacity, *see* John Cassan Wait, THE LAW OF CONTRACTS 239 (1st ed. 1901) (describing the "universal custom in construction contracts" at that time of designating the engineer or architect on the project as "a referee, umpire or arbitrator for the determination of questions in dispute, or of matters of facts necessary to be determined in order to

complete the works or to pay for them," and compiling English authorities).

The extension of judicial and quasi-judicial immunity to private attorneys has carried through to the present day. *See, e.g.*, *Constant v. Wilson*, 856 F.2d 202 (Fed. Cir. 1988) (immunity conferred upon private individuals appointed to serve as special masters); *Bailey v. Utah State Bar*, 846 P.2d 1278, 1281 (Utah 1993) (state bar associations with respect to their judicial functions); *Carroll v. Gross*, 984 F.2d 392, 393 (11th Cir. 1993) (members of those associations who conduct bar disciplinary proceedings); *Kissell v. Breskow*, 579 F.2d 425, 429-430 (7th Cir. 1978) (same); *Tindell v. Rogosheske*, 421 N.W.2d 340, 341 (Minn. Ct. App. 1988) (private persons appointed as guardians ad litem); *In re Scott County Master Docket*, 618 F. Supp. 1534, 1573 (D. Minn. 1985) (same), *aff'd sub nom. Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987).

Whether or not all of those immunities would be incorporated into Section 1983, the historical record is clear that immunity principles commonly extended to private attorneys temporarily retained to contribute their skills to the execution of essential governmental functions and services.

c. The unique fiduciary role of attorneys

Unsurprisingly, given that history, the common law generally "*did* provide a kind of immunity for certain private defendants, such as doctors or lawyers who performed services at the behest of the sovereign." *Richardson*, 521 U.S. at 407 (citing Joel Prentiss Bishop, COMMENTARIES ON NON-CONTRACT

LAW §§ 704, 710 (1889)). English barristers historically enjoyed (and still enjoy) a common law immunity from suit for professional negligence. *See Tower v. Glover*, 467 U.S. 914, 921 (1984); Bishop, *supra* § 704. As *Richardson* recognized, that immunity derives from the barrister's role as both a private advocate and a public officer owing "a duty, not to his client only, but also to the court, to the members of his own profession, and to the public." *Rondel v. Worsley*, 1. A.C. 191 (H.L.) 227 (Scot.) (1969). At common law, "a barrister [wa]s to be considered, not as making a contract with his client, but as taking upon himself an office or duty, in the proper discharge of which not merely the client, but the Court in which the duty is to be performed, and the public at large, have an interest," *Swinfen v. Lord Chelmsford*, 157 Eng. Rep. (Ct. of Exchequer) 1436, 1448 (1860). Rooted in the barrister's public role and responsibilities, the purpose of the common law rule of immunity thus was to ensure that the barrister remained "entirely independent, and act[ed] according to his own discretion and judgment in the conduct of the cause for his client." *Batchelor v. Pattison & Mackersy*, 3 R. (Ct. of Sess.) 914, 918 (Scot.) (1876).

American courts have likewise long recognized the attorney's dual role as a private advocate and public officer deriving from English common law. *See, e.g.*, *Ex parte Bradley*, 74 U.S. (7 Wall.) 364, 374 (1868) (recognizing attorneys as officers of the court); *Robinson's Case*, 131 Mass. 376, 379 (1881) ("An attorney at law is not indeed, in the strictest sense, a public officer. But he comes very near it."); *In re*

Mosness, 39 Wis. 509, 509 (1876) ("[A]ttorneys and counselors of a court, though not properly *public* officers, are *quasi* officers of the state whose justice is administered by the court."); *In re Austin*, 5 Rawle 191 (Pa. 1835) ("An attorney-at-law is an officer of the court.").

Indeed, unlike the vast majority of private individuals and entities that may contract for work with the government, *see Richardson*, *supra*, attorneys—like the governmental employees with whom they team—are sworn to uphold the Constitution and laws. *See* CAL. BUS. & PROFESSIONS CODE § 6067 (West 2011) ("Every person on his admission shall take an oath to support the Constitution of the United States and the Constitution of the State of California, and faithfully to discharge the duties of any attorney at law to the best of his knowledge and ability."); SUP. CT. R. 5.4 ("I, ..., do solemnly swear (or affirm) that as an attorney and as a counselor of this Court, I will conduct myself uprightly and according to law, and that I will support the Constitution of the United States."); *see also In re Griffiths*, 413 U.S. 717, 725-727 (1973) (noting that attorneys take an oath to uphold the Constitution).

To be sure, mere status as a lawyer and officer of the court alone does not suffice to entitle an attorney to immunity under Section 1983. *See Tower*, 467 U.S. at 923 (no immunity from allegations of intentional misconduct by public defenders). Instead, *Richardson* properly cabined the relevant context to work "at the behest of the sovereign," 521 U.S. at 407, thereby implicitly recognizing the long tradition, well-known to both the common law and those who enacted Section 1983, of private attorneys temporarily imbedding themselves within public agencies to provide representation and legal counsel in the execution of important governmental operations.

Immunity for attorneys is appropriate in that specific context because lawyers that take on the representation of a governmental entity have a fiduciary duty to act in the government client's best interests, heedless of their own private interests. *See Forrester v. White*, 484 U.S. 219, 223 (1988) (immunity applies to government officials, in part, because their decisions "above all are informed by considerations other than the personal interests of the decisionmaker"). Unlike the private prison guards in *Richardson*, who were presumed to act out of economic motivation and business self-interest, 521 U.S. at 409-411, "[t]he relation between attorney and client is a fiduciary relation of the very highest character, and binds the attorney to most conscientious fidelity," *Cox v. Delmas*, 99 Cal. 104, 123 (1893); *see Griffiths*, 413 U.S. at 724 n.14 (noting the attorney's fiduciary duty to further the clients' interests, rather than personal interests, "by all lawful means"). It thus is "an attorney's duty to protect his client in every possible way" and to "devot[e] his entire energies to his client's interests" rather than his own. *Santa Clara County Counsel Attorneys Ass'n v. Woodside*, 869 P.2d 1142, 1155 (Cal. 1994) (internal quotation marks and citation omitted); CAL. RULES OF PROF'L CONDUCT R. 3-120 cmt. (2010) ("The relationship between an attorney and client is a fiduciary relationship of the very highest character."); *see also* American Bar Ass'n, MODEL RULES OF PROF'L CONDUCT, PREAMBLE ¶ 2 (2010) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."); *id.* R. 1.7 cmt. ¶¶ 1, 31 (providing that "[l]oyalty and independent judgment are essential elements in the lawyer's relationship to a client").[4] The "nature of the[] [temporarily engaged attorney's] relation to the government" and to the pursuit of governmental ends thus is no different from a permanently engaged government lawyer. *Richardson*, 521 U.S. at 404.

That fiduciary duty likewise ensures that attorneys retained to represent governmental clients work under the direction and control of the governmental client. *See* American Bar Ass'n, MODEL RULES OF PROF'L CONDUCT R. 1.2 (2010) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation * * * [and] shall consult with the client as to the means by which they are to be pursued."); CAL. RULES OF PROF'L CONDUCT R. 3-120 cmt. (2010) ("In all client matters, a member is advised to keep clients' interests paramount in the course of the member's representation.").

Attorneys, in other words, bear little resemblance to the independent-contractor private prisons, subject only to "limited direct supervision," in *Richardson*, 521 U.S. at 413, or to public defenders whose central duty is to work at cross-purposes with the government. Attorneys like petitioner who are temporarily retained to represent and advise the government commonly work hand in glove with their public clients, imbedded right alongside government employees. They provide their legal services and advice in direct and close coordination with their governmental clients, with the ultimate decisionmaking authority resting in the fully and candidly informed governmental client. *See* Pet. App. 7-8 (petitioner recommends legal strategy to Fire Chief Wells, but Chief Wells executes the order to view respondent's unused building materials).

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[4] The only qualifications are the same duties of ethical conduct, candor, and honest dealing as officers of the court that apply with equal force to attorneys in permanent government employment.

Those fundamental characteristics of the attorney's role and its relation to the governmental interest, when combined with the extensive history of private attorneys representing governmental entities, explain why this Court properly noted in *Richardson* the distinct historic claim to immunity that private attorneys historically enjoyed when "serving as an adjunct to government in an essential governmental activity, or acting under close official supervision," 521 U.S. at 413, and "at the behest of the sovereign," *id.* at 407. When, as here, the legal service is closely integrated with government officials and governmental activities, temporarily engaged attorneys are making the same judgments for the same public purposes with the same commitment to the government's and public's institutional interests and the same public policy consequences as permanently engaged government lawyers. And qualified immunity's protection of that same area of discretionary judgment is just as necessary.

In short, the line that the Ninth Circuit perceived between public and private practice was, in historic actuality, a bridge. History documents that the type of temporary or interim adjunct governmental representation provided by petitioner in this case was paradigmatic of how government executed its legal functions and operations at the time of Section 1983's enactment. That is the reality against which immunity principles necessarily were formulated in the common law, and that is what Section 1983 carried forward. *See Kalina*, 522 U.S. at 123 ("Congress intended the statute [Section 1983] to be construed in the light of common-law principles that were well settled at the time of its enactment.").

4. The Historically Proper Test is Whether the Temporarily Retained Attorney Worked Under the Direction of Government Employees in Executing an Essential Governmental Activity

Because private attorneys pervasively represented governmental entities and were a primary source of the legal services and counsel that State and local governments obtained at the time of Section 1983's enactment (as well as now), immunity doctrines protecting governmental activities and court processes would be of little value if they did not extend to governmentally retained private attorneys. For example, a prosecutorial immunity doctrine that walled off all private attorneys would have been a feeble protection for the government's interests because the number of *public* prosecutors, rather than temporarily engaged, private-attorney prosecutors in 1871, was low. *See Kalina*, 522 U.S. at 132 (Scalia, J., concurring); Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEGAL HIST. 43, 43 (1995) ("[B]ecause of deficiencies in the office of public prosecutor, privately funded prosecutors constituted a significant element of the state criminal justice system throughout the nineteenth century.") (footnote omitted).

Likewise, the immunity afforded to executive branch officials administering and enforcing laws, *see generally Mitchell v. Forsyth*, *supra*, would have been a hollow promise if it did not extend to the manifold attorneys general, county attorneys, and city attorneys providing vital legal counsel to core governmental operations in conjunction with their private practices.

Still other executive, legislative, and judicial branch functions were also commonly performed by private persons temporarily engaged to fill the public role. Indeed, were the police activities immunized in *Malley* confined to formally employed public police officers, the immunity doctrine would have had little meaning at the time of Section 1983's enactment because, until the mid-nineteenth century, police duties were performed by a "patchwork of private and quasi-public" individuals. Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 UTAH L. REV. 573, 579 (2005). To conclude that immunity principles do not include such temporarily retained private individuals thus would be to open a yawning chasm between doctrine and historical reality.

Accordingly, the test for immunity that is most consonant with historical practice is whether the attorney is the functional equivalent of a government employee based on (i) the nature of the advisory or representative role the attorney performs, (ii) the control exercised by and close coordination with government employees or officials, (iii) the role that the attorney's legal counsel plays in the execution of "an essential governmental activity," ***Richardson***, 521 U.S. at 413, and (iv) the immunity accorded to government employees performing the same role. Particularly when combined with the attorney's fiduciary duty to advance exclusively the governmental interests of his government client subject to that client's control and direction, those factors ensure that the immunity attaches only to the extent that the attorney's work serves the same public ends as the work of an attorney internal to the government would.

First, that approach to identifying who is eligible for qualified immunity based on their functional equivalence to government employees comports with this Court's precedent. In ***Bogan v. Scott-Harris***, 523 U.S. 44 (1998), this Court extended legislative immunity to local legislators because of the "functional equivalen[cy]" between local and regional legislators, the latter of which already had been accorded immunity, *id.* at 53. Likewise, in both ***Mitchell*** and ***Harlow, supra,*** this Court held that entitlement to immunity focused on the governmental role performed by individuals, not their title or "station," *Harlow*, 457 U.S. at 812. *See Mitchell*, 472 U.S. at 521; *see also Kalina*, 522 U.S. at 127 ("[I]n determining immunity, we examine 'the nature of the function performed, not the identity of the actor who performed it.'"). Finally, *Richardson* itself stressed that the "nature of the[]" private individual's "relation to the government" is a relevant factor in immunity analysis, *id.* at 404, and that immunity might be most appropriate when a private attorney "serv[es] as an adjunct to government in an essential governmental activity," *id.* at 413.[5]

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[5] In *Richardson*, this Court stated that the "functional approach" to immunity analysis is used "to decide which type of immunity—absolute or qualified—a public officer should receive." 521 U.S. at 408. The point here, however, is not that an attorney's function is dispositive of entitlement to immunity, but that the nature of the role played by the attorney and the service provided to the governmental entity are important factors in determining the character of the attorney's relationship to the government and whether the temporarily retained attorney is providing, as an adjunct, the same services for which permanently engaged lawyers in a larger governmental entity would be immune.

Having said that, it is far from clear why, if a functional analysis is appropriate to discern the line between absolute and qualified immunity, it is not equally adept at discerning the line between no immunity and qualified immunity. *See Forrester*, 484 U.S. at 224 ("Running through our cases, with fair consistency, is a 'functional' approach to immunity questions other than those that have been decided by express constitutional or statutory enactment."); *cf. West v. Atkins*, 487 U.S. 42, 56 (1988) (the nature of the function performed by a private person for the State determines whether he "is acting under color of state law" for purposes of Section 1983 liability).

Here, petitioner worked arm in arm with a team of governmental employees fulfilling the quintessential governmental role of conducting an investigation into the possible violation of civil service laws and the supervision of a governmental servant responsible for providing critical health and safety services to the public. Petitioner performed the same role that an in-house lawyer in a government with a larger legal budget and staff would provide, and was obligated by his fiduciary duty to serve zealously and forthrightly the same public and governmental interests that the Fire Chief and Battalion Chiefs protect. Whether that conduct merits immunity should "be determined by its character, and not by the character of the agent" as temporarily or permanently engaged government counsel. *Ex parte Virginia*, 100 U.S. 339, 348 (1879) (judicial immunity).[6]

Second, to deprive individuals of the protection of qualified immunity simply because they were not permanent members of the civil service or formally deputized government employees would inject a level of formalism and asymmetrical liability into the immunity inquiry that has no anchor in historical practice. Indeed, the qualified immunity doctrine largely predates the development of a formalized or comprehensive cadre of governmental lawyers, let alone any evidence of formal deputization processes by local and state governments. *See* FEDERAL JUSTICE, *supra*, at 225 ("[T]he Department of Justice came into formal existence on July 1, 1870."); *Delegation of the Criminal Prosecution Function*, *supra*, at 432 ("[F]rom the Founding until the early twentieth century, the state and even victims themselves regularly retained private attorneys to prosecute criminal offenses."); *Privately Funded Prosecution*, *supra*, at 43 (although by 1820 "most states had established local public prosecutors[,] * * * because of deficiencies in the office of public prosecutor, privately funded prosecutors constituted a significant element of the state criminal justice system throughout the nineteenth century"); David A. Sklansky, *Private Police*, 46 UCLA L. REV. 1165, 1205 (1999) (early American law enforcement "drew no clear lines between public and private") (internal quotations and citation omitted).

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[6] In all likelihood, the county judge whose immunity was at issue in *Ex parte Virginia* would have also been engaged in private practice. The Virginia Constitution did not bar the "practice of law" by county judges until 1902. *Compare* VA. CONST., ART. VI, § 24 (1872), *with* VA. CONST., ART. VI, § 105 (1902).

Indeed, "one of the dominant characteristics of American policymaking over time has been the curious blending of public and private initiatives, techniques, and institutions." "Public-Private Governance," *supra*, at 26. Throughout the nineteenth century, the blurred and overlapping boundaries of public and private work for attorneys and others served the public interest as "cash-starved state governments" relied on private parties to "stretch[] capacity, spread[] costs, and lessen[] the need for an expansive, professional bureaucracy." *Id.* at 30-31 (describing, *inter alia*, advantages of private prosecutions of local regulatory laws in nineteenth century).

Third, the common law forecloses overlaying immunity doctrine with formalisms like job title or heavily paperworked appointments. Rather, the common law focused on the governmental role and activity in question and whether the private individual was performing, at the behest of the government, the same function that a government employee would otherwise perform. In *Dunn v. Mellon*, 23 A. 210 (Pa. 1892), for example, the Pennsylvania Supreme Court held that immunity attached to a private citizen "as the mere representative of a municipal officer," since the officer himself could have performed the duty "without any personal liability," *id.* at 210. The public-private distinction made no difference to the court. What was critical was that the private person was performing activities for which a government employee in the same position would have enjoyed immunity. "If, in such circumstances, the municipal officer would be exempt from individual liability for executing the orders of the city, we know of no reason why the citizen should be subject to such liability," especially since he was "apparently subject to the duty of obeying the mandatory order of the authorities." *Id.* at 210-211; *see also Lee Tung v. Burkhart*, 116 P. 1066, 1069 (Or. 1911) (no liability for private defendant sued for evicting plaintiffs at behest of municipal authorities, because "the whole transaction * * * was merely an assertion of her claim of right to render to the municipal officers of Portland assistance, by vacating the building and preparing it to be taken down in obedience to their command, the authority for which defendant appears not to have questioned").

Fourth, nor would such paperwork or labeling formality do anything to serve the purposes of Section 1983 or its immunity doctrines. A government's level of bureaucratic hierarchy or complexity says nothing about that government's respect for the constitutional or civil rights of the individuals with whom it deals, nor does it alter the need for and value of obtaining affordable legal counsel for governmental operations. To be sure, such bureaucratic formalities may well reflect the size and financial resources of the government at issue. But those factors are utterly irrelevant to the rights that Section 1983 seeks to protect and the valuable public purposes that the qualified immunity doctrine advances.

On the other hand, hinging immunity critically on the formality or permanency of governmental appointments would turn qualified immunity into a complex factual inquiry, infused with fine line-drawing, and capable only of (i) derailing qualified immunity's protection from suit by injecting fact disputes that must be resolved at trial, or (ii) rewarding bureaucratization for the sake of bureaucratization, rather than encouraging the compliance with federal law that is the aim of Section 1983. *Cf. Anderson v. Creighton*, 483 U.S. 635, 645-646 (1987) (noting that "entangling" the qualified immunity inquiry in excessive "complexity" can "utterly defeat[]" the protection that qualified immunity is meant to provide).[7]

B. Extending Qualified Immunity To Private Attorneys Retained To Provide Legal Counsel To Governmental Entities In The Execution Of Essential Public Duties Fulfills The Purposes Of The Immunity Doctrine

Extending the same qualified immunity that is already accorded to permanently engaged government attorneys to temporarily engaged attorneys, who (like petitioner) provide legal counsel to local and state governments in the execution of their essential public functions, fully comports with the reasons for the immunity doctrine.

1. Private Attorneys Remain a Critical Source of Legal Advice for Local and State Governments

Ensuring that government officials have access to legal counsel in the execution of their important public functions is critical to the integrity of governmental operations and their compliance with the same federal laws and constitutional provisions that Section 1983 enforces. But, given the realities of State and local budgets, limitations on the size of government, and the variety of legal needs that can confront public agencies, commonly the most "cost-effective and fiscally responsible manner" for governments to "meet their needs for legal services * * * is to hire private attorneys either to provide specific services on an ad hoc basis or to serve as city attorney or county counsel." California Cities Cert. Amicus Br. 5-6; *see id.* at 8-9.[8]

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[7] For example, how precisely it could be determined when a mayor paused from being a mayor or when a state legislator took off her legislative hat, or which hours in the day a private prosecutor counts as public and which as private are intractable inquiries turning on standards nowhere articulated in the common law. *See Richardson*, 521 U.S. at 422 (Scalia, J., dissenting) ("I see no sense in the public-private distinction, neither do I see what precisely it consists of.").

Indeed, the need to employ private attorneys cuts across governments. With respect to city attorneys, for example, 78% of those employed by California cities—including the City of Rialto—assume that role of public representation while engaged in private practice. California Cities Cert. Amicus Br. 6 (quoting Philip D. Kahn, *Privatizing Municipal Legal Services*, 10 Local Gov't Studies, No. 3, at 1 (1984)). Water districts, school districts and boards, and counties rely heavily on private counsel as well. *Id.* (citing Kahn, *supra*, at 2 & n.8).[9]

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[8] Governmental reliance on private individuals to execute critical governmental operations and functions, of course, is not limited to attorneys. Volunteer firefighters, police reserve corps, and adjunct university professors are also commonplace means of providing governmental services in a cost-effective and resource-calibrated manner. *See, e.g., Griffith v. Lanier*, 521 F.3d 398, 399 (D.C. Cir. 2008) (The Metropolitan Police Department's Reserve Corps is a body of "unpaid volunteers who assist full-time officers * * * in the provision of law enforcement services."). But because this Court's precedent has approached immunity questions narrowly, *see Richardson*, 521 U.S. at 413, this brief focuses on the distinctive claim to immunity, grounded in both history and "'special policy concerns,'" *id.* at 404 (citation omitted), presented by privately retained attorneys that work in close coordination with government officials in rendering essential governmental services.

State governments also rely upon private attorneys to meet their needs for distinctive legal services. *See, e.g.*, *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings College of the Law v. Martinez*, 130 S. Ct. 2971 (2010) (California public law school represented by private attorney); *Kansas v. Marsh*, 548 U.S. 163 (2006) (Kansas represented by private attorney); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Michigan public university represented by private attorney); *Florida ex rel. Attorney General v. United States Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011) (States challenging legality of Patient Protection and Affordable Care Act represented by private attorneys), *cert. granted*, Nos. 11-393, -398, -400 (Nov. 14, 2011).

So too does the federal government. *See, e.g.*, General Accounting Office, PRIVATE ATTORNEYS: INFORMATION ON THE FEDERAL GOVERNMENT'S USE OF PRIVATE ATTORNEYS (Oct. 1992); William V. Luneburg, *Contracting by the Federal Government for*

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[9] "Few cities and counties provide any compensation for service on school boards, and often it is difficult to persuade qualified persons to assume the burdens of this important function in our society." *Wood*, 420 U.S. at 331 (Powell, J., concurring in part & dissenting in part).

Legal Services: A Legal and Empirical Analysis, 63 NOTRE DAME L. REV. 399 (1988); 31 U.S.C. § 3718 & 42 U.S.C. § 404 (both: authorizing the engagement of private attorneys for debt collection); 48 C.F.R. § 7.503(d)(18) (Federal Acquisition Regulations authorize contracts for "legal advice and interpretations of regulations and statutes to Government officials"); Sara Forden, *U.S. Justice Department Said to Hire Lawyer for AT&T Trial*, BLOOMBERG, Oct. 18, 2011; Brian Baxter, *TARP Ends and Treasury Hires 13 Firms to Run What Remains*, THE AM LAW DAILY, Oct. 4, 2010; Federal Deposit Ins. Corp., MANAGING THE CRISIS, CH. 18: THE FDIC'S USE OF OUTSIDE COUNSEL (1998).[10]

Ensuring that governments have affordable access to high-quality legal representation promotes the same compliance with the law that Section 1983 seeks to enforce. So too does an immunity doctrine that ensures the affordability of legal counsel and the even-handed treatment of governments regardless of their size or legal budgets.

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[10] While the federal government is not subject to suit under Section 1983, litigation under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), presents the same qualified immunity questions, and the scope of immunity in both contexts is coextensive. *See, e.g.*, *Wilson v. Layne*, 526 U.S. 603, 609 (1999) ("Although this case involves suits under both § 1983 and *Bivens*, the qualified immunity analysis is identical under either cause of action.").

2. *Immunity Prevents Timidity in the Provision of Legal Advice*

"[U]nwarranted timidity" is "the most important special government immunity-producing concern." *Richardson*, 521 U.S. at 409. That is because immunity at common law existed in large part to mitigate "the danger that the threat of * * * liability would deter [a government employee's] willingness to execute his office with the decisiveness and judgment required by the public good." *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974), *abrogated in part not relevant by Harlow*, 457 U.S. 800; *accord Butz v. Economou*, 438 U.S. 478, 495, 507 (1978) (immunity for federal officials). Indeed, a primary reason for this Court's adoption of an objective test for qualified immunity in *Harlow* was "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" 457 U.S. at 814 (alteration in original; citation omitted). Qualified immunity thus recognizes that, "where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'" *Id.* at 819 (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967)); *see also Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (qualified immunity's "accommodation for reasonable error exists because 'officials should not err always on the side of caution' because they fear being sued").

That vital interest in ensuring that the public interest alone, and not concerns about personal liability, motivates governmental decisionmaking applies doubly to temporarily retained attorneys.

First, immunity would ensure that the advice rendered by retained attorneys to government officials is comprehensive, candid, and unflinching even when sensitive, hurried, or unpopular decisions must be made. What is critical is that the legal advice given to guide the actions of government officials be motivated exclusively by professional judgment and responsibility, rather than be hesitant or hemmed in by litigation intimidation. Whether the attorney providing the advice spends the rest of her day advising other public clients or private clients is quite beside the point. Qualified immunity's concern is the comprehensive protection of discretionary governmental decisionmaking during those times devoted to governmental service.

Purely public-minded advice, however, subsists with great difficulty in an environment in which retained attorneys face the substantial risk of personal liability created by Section 1983, a statute that now "pours into the federal courts tens of thousands of suits each year." *Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting); *see* Martin A. Schwartz, SECTION 1983 LITIGATION: CLAIMS & DEFENSES § 1.01[B] & n.15 (2011) ("[T]oday, between 40,000 and 50,000 § 1983 actions are commenced in federal court each year.") (citing 1998-1999 statistics); David W. Neubauer, AMERICA'S COURTS AND THE CRIMINAL JUSTICE SYSTEM 73 (10th Ed. 2010) ("Approximately 1250 *Bivens* cases are filed annually in the Federal Courts.").

But that is not all: temporarily engaged attorneys face the even greater risk that they *alone* will be left holding 100% of the liability bag for collective governmental actions because (as occurred here) all of the permanent government employees will be dismissed on immunity grounds. Section 1983 actions not uncommonly seek to impose joint and several liability on multiple defendants. "In joint and several liability systems," however, "a solvent defendant, if found to be responsible for the plaintiff's harm, must bear the entire cost of the injury even if other potential defendants are immune, insolvent, or excluded from liability for any other reason." Jonathan Cardi, *Apportioning Responsibility to Immune Nonparties: An Argument Based on Comparative Responsibility and the Proposed Restatement (Third) of Torts*, 82 IOWA L. REV. 1293, 1294-1295 & n.7 (1997) (citing Edward J. Kionka, *Recent Developments in the Law of Joint and Several Liability and the Impact of Plaintiff's Employer's Fault*, 54 LA. L. REV. 1619, 1620 (1994)).[11]

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[11] According to the article, only a handful of jurisdictions soften this rule when the immune entity has a greater degree of fault than the remaining defendant. *See, e.g., Nance v. Gulf Oil Corp.*, 817 F.2d 1176, 1180 (5th Cir. 1987) (limiting joint and several liability when immune employer had greater degree of fault than remaining defendant); *Apportioning Responsibility, supra*, at 1294-1295 n.7; *see also* Gregory C. Sisk, *Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform*, 16 U. PUGET SOUND L. REV. 1, 51-52 (1992).

The selective withholding of immunity from temporarily engaged attorneys thus exposes them to an extraordinary liability risk.

Second, qualified immunity encourages governmental officials and employees to seek out the best legal advice available unconstrained by concerns about imposing the heightened financial risk of indemnification on the government. The use of Section 1983 to hold temporarily engaged private attorneys liable for 100% of that attorney's *and the immune defendants'* liability, *see Apportioning Responsibility*, *supra*, thus not only would be textually and historically anomalous, but also would have profoundly adverse consequences for the quality and caliber of governmental decisionmaking. That is because, if joint and several liability is alleged, any duty to indemnify the private attorney would sweep in with it the duty to indemnify the full damage award, including those damages attributable to the dismissed, immune government defendants. The indemnification obligation accordingly would unravel the immunity accorded to the permanent government defendants, and would confront any indemnifying government with the full measure of liability. That is precisely what qualified immunity is supposed to protect against. *See, e.g.*, *Harlow*, 457 U.S. at 807, 819 (immunity justified by "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of public authority," and because "the public interest may be better served by action taken with independence and without fear of consequences") (internal quotations and citation omitted).

That risk of liability, moreover, is especially chilling in cases like this that involve labor and employment law. This Court has long recognized the distinct risk to governmental effectiveness and interests posed by litigation over governmental employment and personnel decisions. Accordingly, "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary," *Connick v. Myers*, 461 U.S. 138, 146 (1983), which "could compromise the proper functioning of government offices," *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004). Whether the advising attorney is temporarily or permanently engaged by the government, the risk that the attorney will temper advice or refrain from action out of concern about "what conclusions a jury would later draw" remains the same. *Waters v. Churchill*, 511 U.S. 661, 676 (1994) (plurality opinion).

Particularly in those areas of governmental activity most susceptible to civil rights claims, like criminal and labor law, it can take both substantive limitations on legal claims (like *Connick*) and strong immunity protections to fend off "a systematic disincentive" to "underenforce[]" the law. *Atwater v. City of Lago Vista*, 532 U.S. 318, 351 (2001). That protection cannot exist, however, under the type of asymmetrical liability scheme devised by the court of appeals here, where the viability of suit (or forced settlements) has everything to do with the size of the relevant government's bureaucracy, and nothing to do with any material difference in the governmental function performed or the legal service provided.

3. Litigation Will Deter Private Attorneys from Providing Governmental Service and Representation

Qualified immunity is also needed to ensure that private attorneys are not deterred from representing governmental clients by the "heavy burdens upon their private resources from monetary liability" that the substantial volume of Section 1983 and *Bivens* litigation would impose. *Wood*, 420 U.S. at 320; *see Richardson*, 521 U.S. at 408 (qualified immunity seeks "to ensure that talented candidates [a]re not deterred by the threat of damages suits from entering public service") (internal quotations and citation omitted).

The risk of deterring attorneys from accepting governmental clients is substantial. Unlike private prisons that have no practicable customer for their detention services other than governmental clients, attorneys can choose to represent private clients just as easily as governmental clients. Thus, if the burdens of governmental representation become too high, attorneys can avoid the world of civil rights liability altogether by simply forgoing governmental representations in their entirety. *Cf. Richardson*, 521 U.S. at 409-410.

Moreover, unlike the highly competitive marketplace for private prison services, *Richardson*, 521 U.S. at 409, private attorneys not uncommonly sacrifice ordinary remuneration levels when representing the government out of a sense of public duty.

In addition, denial of immunity will lead to skyrocketing professional insurance premiums as private-practice plans have to expand to cover a whole new species of liability—constitutional torts—and the even more substantial risk of being forced to pay the costs of litigating through trial the frequently leveled claims that arise under Section 1983. In this case, for example, it took nothing more than the suggestion that respondent corroborate his explanation to have his attorney threatening to sue almost everyone in the room. Pet. App. 46.

There is no "free lunch": "as civil-rights claims increase, the cost of civil-rights insurance increases" commensurately. *Richardson*, 521 U.S. at 419 n.3 (Scalia, J., dissenting). Professional liability policies typically exclude various kinds of claims from their coverage, including in some cases claimed violations of the plaintiff's constitutional rights. *See generally* Willy E. Rice, *Insurance Contracts and Judicial Decisions Over Whether Insurers Must Defend Insureds that Violate Constitutional and Civil Rights: An Historical and Empirical Review of Federal and State Court Declaratory Judgments 1900-2000*, 35 TORT & INS. L. J. 995 (2000) (surveying widespread variations in coverage for claimed civil rights violations). Furthermore, the insured remains liable for the amount of any adverse judgment in excess of the coverage provided by the policy.

Still worse, while qualified immunity determines the defendant's amenability to suit using an objective standard, *see Harlow*, 457 U.S. at 816-817, an insurer's duty to defend depends entirely on the language of the plaintiff's allegations as the plaintiff chooses to plead them, *see* 44 Am. Jur. 2d Insurance § 1400 (2011) ("Generally, the obligation of a liability insurance company under a policy provision requiring it to defend an action brought against the insured by a third party is to be determined by the allegations of the complaint or petition in such action.") (footnote omitted).

The risk of making governmental representation cost prohibitive for both the government and the attorneys is particularly acute when, as commonly occurs and happened here (J.A. 24-25), punitive damages are sought. California, like sixteen other States, forbids insurance coverage for punitive damages awards against individuals liable for non-vicarious tort violations.[12]

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[12] *See PPG Indus., Inc. v. Transamerica Ins. Co.*, 975 P.2d 652, 657 (Cal. 1999) ("[O]ur public policy prohibits indemnification for punitive damages."); *Bohrer v. Church Mut. Ins. Co.*, 12 P.3d 854, 856 (Colo. App. 2000); *Bodner v. United Servs. Auto Ass'n*, 610 A.2d 1212, 1221-1222 (Conn. 1982); *United States Concrete Pipe Co. v. Bould*, 437 So. 2d 1061, 1064 (Fl. 1983); *Beaver v. Country Mut. Ins. Co.*, 420 N.E.2d 1058, 1061 (Ill. App. Ct. 1981); *Grant v. North River Ins. Co.*, 453 F. Supp. 1361, 1370-1371 (N.D. Ind. 1978); *Hartford Accident & Indem. Co. v. American Red Ball Transit Co.*, 938 P.2d 1281, 1286 (Kan. 1997); *Braley v. Berkshire Mut. Ins. Co.*, 440 A.2d 359, 361-362 (Me. 1982); *Perl v. St. Paul Fire & Marine Ins. Co.*, 345 N.W.2d 209, 216 (Minn. 1984); *Johnson & Johnson v. Aetna Cas. & Sur. Co.*, 667 A.2d 1087, 1091 (N.J. Super. Ct. App. Div. 1995); *Biondi v. Beekman Hill House Apartment Corp.*, 692

The consequence is obvious: facing "potentially disabling threats of liability," *Harlow*, 457 U.S. at 806, attorneys will no longer be willing or able to afford to take on governmental representations.

There is, moreover, no countervailing gain for civil rights enforcement accomplished by a liability scheme in which recovery depends entirely on the lottery-like happenstance that one of the governmental defendants turns out to have been temporarily engaged from private practice. The seriousness of civil rights violations and the need for remediation has everything to do with the nature of the governmental activity engaged in and the supervisory responsibility of governmental officers, and nothing whatsoever to do with whether, at other times, one of the defendants dons a non-governmental hat.

N.Y.S.2d 304, 309 (N.Y. App. Div. 1999); OHIO REV. CODE ANN. § 3937.182(B) (West 2001); *Dayton Hudson Corp. v. American Mut. Liability Ins. Co.*, 621 P.2d 1155, 1160 (Okla. 1980); *Butterfield v. Giuntoli*, 670 A.2d 646, 654-655 (Pa. 1995); *Allen v. Simmons*, 533 A.2d 541, 544 (R.I. 1987); *City of Fort Pierre v. United Fire & Cas. Co.*, 463 N.W.2d 845, 848 (S.D. 1990); UTAH CODE ANN. § 31A-20-101 (West 2003).

Tennessee is not one of those States, *West v. Pratt*, 871 S.W.2d 477, 480 (Tenn. 1994), which simply underscores the unusual "marketplace" conditions in which *Richardson* was decided.

4. Qualified Immunity Will Prevent Attorneys from Being Distracted in the Performance of Their Duties

Finally, qualified immunity is an immunity from suit, *Mitchell*, 472 U.S. at 526, precisely because of the extensive distraction that litigation causes from the performance of ongoing responsibilities, *see Richardson*, 521 U.S. at 411. *See Harlow*, 457 U.S. at 814, 816 (social costs of suits against government officials include "diversion of official energy from pressing public issues" and "distraction of officials from their governmental duties").

In other words, the prospect of damages liability is just the beginning of the toll that vulnerability to litigation exacts. Absent qualified immunity *from suit*, privately retained attorneys must now also factor into retention decisions the enormous time and resource costs associated with being subjected to defending against damages claims for years going forward, and enduring "'the costs of trial or * * * the burdens of broad-reaching discovery.'" *Mitchell*, 472 U.S. at 526 (citation omitted). For example, more than five years after he provided legal advice to Chief Wells, petitioner is left fighting and litigating all alone constitutional tort claims and punitive damages arising from an order he never gave and an alleged search that he did not conduct.

Unlike the prison contractors in *Richardson*, whose customer base is confined to governmental entities, private attorneys can eschew the representation of governments. Given the time, resource, and financial costs that the Ninth Circuit's rule has laden onto governmental representations, only "'the most resolute'" public-minded attorneys, "'or the most irresponsible'" will be willing to take on such cases. *Harlow*, 457 U.S. at 814 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Learned Hand, J.)).

Such a compelled withdrawal of private attorneys from public service due to financial and resource exhaustion would have devastating consequences for the large number of State and local governments that depend critically upon those attorneys in the performance of essential governmental activities and that would be deprived of affordable access to quality legal advice. *See generally* League of California Cities Cert. Amicus Br. at 4-9. When resource-constrained and "cash-starved" state and local governments can no longer rely on private attorneys to "stretch[] capacity, spread[] costs, and lessen[] the need for an expansive, professional bureaucracy," "Public-Private Governance," *supra*, at 30-31, many governments will have no choice but to forgo legal advice and representation. That is because expanding governmental bureaucracies is commonly neither politically nor financially viable and, quite frankly, makes no sense at all for small governments for which the need for legal services is sporadic and variable.

What a surprise it would be to those who enacted Section 1983 to *enhance* state and local governments' compliance with the law to discover that, through convoluted contortions of statutory purpose and history, Section 1983 now affirmatively *obstructs* the efforts of government to understand their legal obligations and to comply with them.[13]

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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[13] *See Wyatt*, 504 U.S. at 180 (Rehnquist, CJ., dissenting) ("Our § 1983 jurisprudence has gone very far afield indeed, when it subjects private parties to greater risk than their public counterparts, despite the fact that § 1983's historic purpose was 'to prevent *state officials* from using the cloak of their authority under state law to violate rights protected against state infringement.'") (citation omitted).

Respectfully submitted.

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November 14, 2011

ADDENDUM

ADDENDUM

TITLE 42. THE PUBLIC HEALTH AND WELFARE

CHAPTER 21. CIVIL RIGHTS

SUBCHAPTER I. GENERALLY

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

RESPONDENT'S BRIEF

No. 10-1018

Supreme Court, U.S.
FILED
DEC 14 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

◆

STEVE A. FILARSKY,

Petitioner,

v.

NICHOLAS B. DELIA,

Respondent.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

◆

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

The marketplace requires professionals to offer the best products and services at a competitive rate. Qualified immunity has as its driving purpose the prevention of unwarranted timidity in public officials who are required to undertake discretionary actions as part of their official duties. This Court has found that qualified immunity is not necessary for private actors in a sufficiently competitive market because competition prevents unwarranted timidity.

Private actors, including both attorneys and non-attorneys, compete to provide quality services, such as employee investigations, to public agencies. Even under the everyday threat of malpractice liability, there is no shortage of private actors offering these services, nor a shortage of public agencies in need of them. These are the hallmark ingredients that make up a competitive market. The question presented is thus:

With no firmly rooted tradition of qualified immunity for private actors investigating public employees for workplace violations, does this already competitive market now require correction by affording qualified immunity to its private actor participants?

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STATEMENT OF THE CASE

Petitioner Steve A. Filarsky is a named partner in the law firm of Filarsky & Watt LLP. Pet. App. 88. Prior to becoming an attorney, he was responsible for labor relations at a small Southern California city, and prior to that was employed by another small city.[1] After becoming an attorney, he switched to the private sector and has been with Filarsky & Watt for 23 years. Pet. App. 88. His firm "specializes in representing public sector employers statewide in all matters pertaining to employment relations."[2] One of his firm's clients for the past 14 years has been the City of Rialto. Pet. App. 89. For the duration of this ongoing relationship the firm has provided diverse services, including conducting interviews for employee investigations, providing legal analysis concerning proposed disciplinary actions, and representing the City in legal proceedings. *Id.*

Respondent Nicholas B. Delia has been a firefighter for Filarksy's client City of Rialto since 2000. Opp. Cert. App. 23. While on duty in early August 2006, he was cleaning up a toxic spill began to feel ill. He went to the emergency room and was told he would have to undergo tests to determine the cause of his illness. Opp. Cert. App. 23. He was bleeding from somewhere, and the emergency room doctor provided

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[1] Filarsky & Watt LLP, www.filarskyandwatt.com/filarsky.html.

[2] *Id.*

Delia with an off-duty work order for three work shifts; however, there were no activity restrictions placed upon him. *Id.* at 23-24. Five days later, Delia returned to the hospital. He was issued an off-duty work order for eight shifts. Again, no activity restrictions were placed on him, and he was scheduled for a colonoscopy to locate the source of the bleeding. Opp. Cert. App. 24.

One week later Delia again returned to the hospital and was given an off-duty work order for another eight shifts, again without any restrictions. He then endured both a colonoscopy and an endoscopy. Opp. Cert. App. 24. He was diagnosed with esophagitis, and after being put off work for a fourth time, he was cleared to return to work after September 3, 2006. *Id.*

The City suspected Delia was in fact not undergoing continuous medical evaluation and hired an investigator to follow and videotape him. Eventually, Delia was videotaped purchasing wood and insulation at a store. Pet. App. 89. He was also videotaped picking up his son from school, and with his son in front of his home. JA 120-121.

Shortly thereafter, Filarsky was asked by his city client to conduct an interview of Delia. Pet. App. 89. Delia was ordered to appear and presented himself with his representative, the firefighter union's attorney. JA 86. This was not the first time Filarsky and Delia met. Filarsky believed that previously, Delia had lied to him about an unrelated matter. JA 167.

Filarsky also had a history with the union's attorney. To paraphrase, Filarsky seems to find him to be generally obstreperous, with a penchant for raising needless objections. JA 170. Two Battalion Chiefs observed the interview. Other than to commence the interview, neither Chief participated, nor were they there for any particular purpose. JA 77, 83, 156. The Fire Chief remained down the hall, working in his office. JA 156.

Filarsky commenced the interview with the usual admonitions, notifying Delia that he was obligated to "fully cooperate and answer questions [and that] [i]f at any time it is deemed you are not cooperating then you can be held to be insubordinate and subject to disciplinary action, up to and including termination." JA 87. Filarsky asked him detailed questions about the colonoscopy and endoscopy. JA 94. Filarsky asked Delia whether he had been placed on any restrictions. Delia answered that he was given no specific restrictions other than to "take it easy and to rest" and not perform firefighter/paramedic functions. JA 96. Delia told Filarsky that during his leave he would still experience dizziness from time to time, and some weakness, but had been given no driving or other restrictions to limit his daily functions around the house. JA 98.

Then Filarsky questioned him about home improvement projects. Delia described some purchases he had made, including the insulation. JA 108. Delia said it was sitting, still packaged, in his kitchen. *Id.* Filarsky asked "[s]o if we visited your house today we would find the insulation in your kitchen. . . ?"

JA 115-116. Delia responded affirmatively. *Id.* Although Delia was under no medical restrictions, and after telling the Chief what he was going to do, JA 157, Filarsky told Delia:

> "[Y]ou have indicated that those building materials that were observed in the video are presently at your home uninstalled. What I want to do is to verify that after you leave here today. So I would like Chief Peel to follow you home to your personal residence and to have you to allow him access to view those building materials."

JA 128.

Delia's attorney told Delia: "You don't have to consent to the search of your house." Filarsky agreed, telling Delia "You don't have to." JA 128-129.

When Delia withheld consent, Filarsky became determined:

> "Okay. Then we will do it a different way. What we will do is we will send you home, and we will have Chief Peel follow you and I will direct you to bring out the piece of plywood and bring out the three bundles of insulation. Any problem with that?"

JA 129.

Delia's attorney asked "Is that an order?" Filarsky responded, "Yes." *Id.*

Delia's attorney counseled Filarsky:

"I don't think you are entitled to order somebody to go into their house and bring articles of their own personal belongings out of the house without a search warrant. That circumvents the whole process." JA 129.

Filarsky was not persuaded. Delia's attorney reiterated his position:

> "By asking that he go in and bring items of his own personal property out, you are issuing an illegal order and violating his right to be free of unreasonable search and seizure. You are also subjecting the City to civil liability for violation of his 4th Amendment rights to be free from unlawful search and seizure. You don't have any right to ask him to bring items of personal property out of his home. . . . If these Chiefs don't speak up and say they don't want to do it, then we are going to name them, too."

JA 130.

Filarsky impatiently stated "Now, we are going to order you to remove those three bundles of insulation." JA 131.

Likely fully exasperated, Delia's attorney again articulated his concerns, and probably feeling the need to have them taken seriously, he reiterated his threat to sue the City and the idle Battalion Chiefs watching this duel unfold, and said "We might possibly find a way to figure if we can name you Mr. Filarsky. You are issuing an illegal order. You have no right to ask him to bring items of personal property outside of his house. If you want to take that chance, you go right ahead." JA 132.

Unflinchingly, the very next words from Filarsky were:

"Second item, we would like a note of some sort from [the medical facility] verifying the procedure that you had on the 29th. Any problem with that?" JA 132.

Delia's attorney tried reasoning with Filarsky: "You are creating an illegal order and you might want to take a minute to think about it." JA 135. Filarsky saw no need.

When pressed by Delia's attorney as to whether Filarsky even had authority to compel compliance with the order, Filarsky responded "[w]hen we are done with the orders, they will ratify the order and then you can go off." JA 136.

Filarsky then prepared a ratifying order for Fire Chief Wells, who was still in his office. He asked the Chief to sign it. The Chief did. JA 158.

Though Filarsky contends that he never issued an order to Delia to remove the property from his house, plainly he did. In their declarations, Battalion Chiefs Bekker and Peel, witnesses to the events, both stated "I did not order Delia to produce the building insulation from his house. The only person who did that orally as far as I was aware was Mr. Filarsky." JA 78, 84.

Both Battalion Chiefs were concerned with Filarsky's tactics in light of the threatened lawsuit. Filarsky "assured" them there was "no problem. . . ." JA 83.

Delia's attorney made his final attempt, cautioning Filarsky against searching "a man's home. The highest level of protection." JA 145. Ultimately, Filarsky got his way. He handed the ratifying order to Delia's attorney. He questioned the language of the order. Filarsky noted it was imprecise "but close enough for government work so to speak, then that is adequate." JA 150.[3]

Thereafter the Battalion Chiefs immediately followed Delia to his home, and as ordered, Delia removed the insulation bundles for them to see, unused and still packaged. JA 78, 85.

On May 21, 2008, Delia filed this lawsuit in the United States District Court, Central District of California. Pet. App. 9. Defendants subsequently moved for summary judgment, which was granted by the district court. *Id.* The court held that Delia had not established municipal liability against the City. Pet. App. 9-11. It further held that the individual defendants, including Filarsky, were all entitled to summary judgment based on qualified immunity. *Id.*

On April 3, 2009, Delia filed an appeal of the district court's decision granting Defendants' motion for summary judgment. The Ninth Circuit held that the warrantless, compelled search of Delia's home violated his rights under the Fourth Amendment. Pet. App. 14-20. However, based on the Ninth Circuit's finding that the rights violated by the unlawful search were not clearly established at the time of the defendants' misconduct, Chief Wells, Peel, and Bekker were entitled to qualified immunity. Pet. App. 20-24.

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[3] The full transcript of the very intense exchange between Filarsky and Delia's attorney commences at JA 128.

The Ninth Circuit then turned its attention to whether Filarsky is entitled to qualified immunity, noting that "[u]nlike the other individual defendants in this case, Filarsky is not an employee of the City. Instead, he is a private attorney who was retained by the City to participate in internal affairs investigations." Pet. App. 24. The Ninth Circuit concluded that Filarsky is not entitled to qualified immunity. Pet. App. 27. Accordingly, it reversed the district court's grant of summary judgment in favor of Filarsky based on qualified immunity and remanded for further proceedings. *Id.*

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SUMMARY OF ARGUMENT

The Court should affirm the Ninth Circuit's decision on the ground that Filarsky, a private individual conducting an interview, is not entitled to qualified immunity. *Richardson v. McKnight*, 521 U.S. 399 (1997). First, there is no firmly rooted tradition of immunity applicable to private actors conducting workplace investigations. Neither Filarsky nor Delia has uncovered such a tradition. This is not surprising: it is unlikely that government had a need to conduct workplace investigations to document and support workplace discipline prior to the enactment of civil service laws or recognition of the right to procedural due process before the deprivation of a property interest in public employment, neither of which was recognized at the time Section 1983 was enacted in 1871. And while this Court recognized at *English* common law lawyers may have been afforded some immunity for negligent conduct, it has already denied qualified immunity to attorneys sued under Section 1983 for intentional misconduct. *Tower v. Glover*, 467 U.S. 914, 922 (1984). And although Filarsky may happen to be an attorney, he was donning his investigator's hat when he conducted the interview. Private non-attorneys conduct workplace interviews and investigations every day without the expectation of qualified immunity.

Second, none of the policy considerations underlying qualified immunity would be advanced by extending qualified immunity to private persons, whether they are attorneys or not, conducting workplace investigations. Qualified immunity seeks chiefly to prevent unwarranted timidity in public officials required to execute their discretionary duties, but this Court has recognized that adequate marketplace pressures will incentivize private companies to perform effectively and efficiently because they have to compete to earn and retain clients. The City of Rialto is but one of many clients of Filarsky's firm, and

Filarsky is but one of many private persons engaged in the business of public workplace investigations. His firm has competition; the City of Rialto can hire another firm. Filarsky was not there at the "behest" of the city. The reality is that private attorneys today do not engage in public law as a result of *any* government behest. No such authoritative command is needed; there is no shortage of private attorneys knocking on government's doors for business. One only need notice the stack of *amici* briefs filed by private attorney associations as proof of that. Indeed, it is this very competition that likely led to Filarsky's timid-free resolve to one way or another get Delia to prove he did not unpack the insulation. Being an attorney only contributed to his bravado to do so and to convince those around him that he could do it.

Third, not extending qualified immunity to private parties conducting workplace investigations will expose one to no more of a risk than someone such as an attorney or doctor may have to a claim of malpractice. Any suggestion that the threat of distracting litigation would increase is purely speculative. Finally, because private competitors like Filarsky are not constrained by civil service restraints and other public policy considerations, they can offset any such increased risk with higher pay or extra benefits. And the market competition will keep the higher pay in check.

To avoid this ineluctable denial of qualified immunity under *Richardson*, Filarsky proposes a reformulation of the qualified immunity test tailored to his needs. However, his test is arbitrary and unworkable. While it incorporates some traditional aspects of the inquiry, it focuses primarily on control exercised by and close coordination with government officials and the role an attorney's legal counsel plays in the execution of an essential governmental activity. These considerations are not rooted in any historical tradition or analogy based on the common law in 1871. And neither test satisfies the overriding policies supporting qualified immunity, most notably preventing unwarranted timidity.

Filarsky makes inanalogous comparisons to absolute immunity as a basis to extend qualified immunity to private actors. However, absolute immunity is supported by policy considerations that address concerns not attendant to activities that are not intimate with the judicial process. Only "special functions," *Butz v. Economou*, 438 U.S. 478, 508 (1978) such as judges, prosecutors, grand jurors and witnesses are accorded absolute immunity. They have a particularly heightened risk of exposure to lawsuits by resentful defendants, and there is no marketplace pressure to offset the timidity that may be created by these risks.

By logical extension, Filarsky's mixed functional-close supervision test should apply to non-attorneys as well. Non-attorneys are just as likely to conduct independent workplace investigations; sometimes outside investigators are hired to create the appearance of independence. And more often than not those investigators are non-attorneys because conventional wisdom counsels against it. Rather, attorneys typically serve in a purely advisory, behind the scenes, capacity. Filarsky, on the other hand, served as both investigator, and perhaps for a brief moment provided counsel to assuage any fears that his conduct crossed constitutional boundaries.

Filarsky further argues that because attorneys take an oath to uphold the law and put their clients' interests first, their goals are indistinguishable from those of publicly employed attorneys. However, as is apparent from Filarsky's conduct, private attorneys who contract with the government have different interests than in-house public attorneys. As this Court noted in *Richardson*, 521 U.S. at 410, public and private employees operate within different systems. Private parties, such as attorneys, have numerous clients to prioritize, each with differing interests. The private attorney seeks to attract and retain these clients. Public attorneys do not have a client, they have only their public-employer agency. Private attorneys do not act solely in the public interest; indeed, how can they when they have billable hour concerns and seek to make the most out of a monthly retainer typical of long-term clients. For the private attorney, time is his only stock in trade.

Furthermore, the functional prong of Filarsky's proposed test is not workable because non-attorneys are just as likely to conduct workplace investigations as attorneys. Moreover, conducting workplace investigations is not a "prototypical government function," *Richardson*, 521 U.S. at 416 (Scalia, J., dissenting). Nor does the absence of qualified immunity deprive private parties of a defense to liability; this Court recognized that private persons may still be able to assert the defense of good faith.

Ultimately, if the Court determines that qualified immunity should be available to private attorneys, it should adopt a standard that recognizes the expertise for which they are sought, and employee a "reasonable attorney" standard to determine whether a well trained attorney should have known that his or her conduct or advice violated constitutional law.

Perhaps this Court should affirm the Ninth Circuit's decision on the ground that Filarsky violated clearly established law.[4] Filarsky attempted to jackhammer the sacred ground of the Fourth Amendment by ordering Delia to move into plain view the contents of his home. Most Americans would be shocked to wake up one day and find that a protection so basic to the safety and security upon which we, as a people, close our doors, turn off our lights, and rest peacefully in bed; a notion that sets our country apart from much of the world, the right to be free from unreasonable searches of the home and to be left alone, could so easily be circumvented by Filarsky's scorched earth policy. How could anyone question the right to lock our doors from government intrusion? There is no legal distinction between physically searching the home and ordering that the home be emptied of its contents and displayed on the front lawn for inspection. Therefore, the Ninth Circuit decision could be affirmed on alternative grounds well-supported by the record.

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[4] Delia is mindful that since he did not file a cross-petition, such a finding would likely have no effect on the government defendants.

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ARGUMENT

I. *Richardson v. McKnight* Sets Forth The Proper Test For Determining Whether Qualified Immunity Should Extend To Private Defendants

As this Court discussed in *Richardson v. McKnight*, 521 U.S. 399 (1997), when determining whether qualified immunity should apply to private persons, one "look[s] both to history and to the purposes that underlie government employee immunity in order to find the answer." *Richardson*, 521 U.S. at 404. Thus, looking to both, the Court first found "no conclusive evidence of a historical tradition of immunity for private parties" serving as prison guards. *Id.* at 407.

Notwithstanding that, the Court then examined "[w]hether the immunity doctrine's *purposes* warrant immunity" for private prison guards. (Emphasis in original) *Id.* ("[I]rrespective of the common law support, we will not recognize an immunity available at common law if § 1983's history or purpose counsel against applying it in § 1983 actions." *Wyatt v. Cole*, 504 U.S. 158, 164 (1992).) The purposes are to protect "'government's ability to perform its traditional functions' by providing immunity where 'necessary to preserve' the ability of government officials 'to serve the public good, to ensure that talented candidates were not deterred by the threat of damages suits from entering public service.'" *Richardson*, 521 U.S. at 408 (citing *Wyatt v. Cole*, 504 U.S. 158, 167). Immunity also meets "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Butz v. Economou*, 438 U.S. 478, 508 (1978). The social costs exacted by insubstantial suits against officials not only include the expense of litigation, but "the diversion of official energy from present public issues" (*Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) and the possibility that the "fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" *Id.*, citing *Gregoire v. Biddle*, 177 F.2d 579, 581 (C.A. 2 1949), cert. denied, 339 U.S. 949 (1950).

Filarsky's ability to claim qualified immunity must be considered under this standard.

II. Filarsky Is Not Entitled To Qualified Immunity Under *Richardson* Because He Failed To Present Evidence Showing A Firmly Rooted Tradition Of Immunity Applicable To Private Actors Conducting Administrative Personnel Investigations, And None Of The Policies Are Advanced

The Ninth Circuit began its analysis of whether Filarsky is entitled to qualified immunity by pointing out that "Filarsky is not an employee of the City. Instead, he is a private attorney, *who was retained by the City to participate in internal affairs investigations.*" Pet. App. 24 (emphasis added). As argued hereinabove, Filarsky has failed to cite to any cases or historical evidence that would support his claim that private actors conducting administrative personnel investigations enjoyed qualified immunity. Without such evidence, he has failed to establish that he is entitled to raise the defense of qualified immunity.

Filarsky's argument in this regard notes this Court's passing reference to immunities previously granted to "certain private defendants, such as doctors or lawyers who performed services at the behest of the sovereign." *Richardson*, 521 U.S. at 407 (citing *Tower v. Glover*, 467 U.S. 914, 921 (1984)).

However, the lawyers referred to by the *Richardson* Court when it cited *Tower*, were *denied immunity under Section 1983 for intentional misconduct*. *Tower*, 467 U.S. at 922; *Hinson v. Edmond*, 192 F.3d 1342, 1345 (11th Cir. 1999).

There, the Court denied immunity for public defenders partly because history showed no established American practice of extending immunity under Section 1983 for intentional misconduct. Because the Court did "not have license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy," together with the dearth of American practice or precedent in extending such immunity, it was "up to Congress to determine whether § 1983 litigation has become too burdensome . . . ". *Tower*, 467 U.S. at 922-923. Analogous British practice is inapposite, because "it is ***American*** common law that is determinative," not ***English*** common law. *Burns v. Reed*, 500 U.S. 478, 493 (1991) (citing *Anderson v. Creighton*, 483 U.S. 635, 644 (1978) (Emphasis in original).

The *Tower* decision where this Court denied qualified immunity to private attorneys acting as public defenders, together with an utter lack of evidence showing individuals in Filarsky's position being extended immunity, demonstrates that the available history provides no support for qualified immunity being extended to private investigators. This despite the vague and isolated historical references regarding our Nation's founding fathers having been engaged in public life, as presented by Petitioner in his brief.

In contrast to the public defenders in *Tower*, whom *were actually engaged and employed as attorneys*, Filarsky was simply retained to conduct a workplace investigation into whether Delia was sick. He was not working in a capacity that might otherwise be entitled to qualified immunity under *Richardson*.

Notwithstanding Filarsky's efforts to recast his role in the investigation, there exists no case or any historical evidence that would support his claim that private actors who conduct workplace personnel investigations have enjoyed qualified immunity. As such, he is not entitled to qualified immunity under *Richardson*.

A. The Public Policy Justifications Relied Upon By This Court In *Richardson* Do Not Support Application Of Qualified Immunity To Filarsky

The second *Richardson* factor–whether public policy justifications support the application of qualified immunity–is virtually ignored by Filarsky. He instead frames his arguments based upon hypothetical and speculative annihilation of affordable legal services to public agencies, with the unsubstantiated conclusion that the denial of qualified immunity will be the death knell of this field of law. However, the question presented is simply whether private actors should be entitled to qualified immunity when they conduct workplace investigations; here there was a simple allegation of misuse of sick leave, which turned out to be unfounded.

In *Richardson*, this Court discussed policy concerns that might give rise to qualified immunity even in the absence of historical evidence of a firmly rooted tradition of immunity. 521 U.S. at 407-412. The first, and most important, concern giving rise to government immunities is unwarranted timidity. *Id.* at 409. However, explained the Court, the concern regarding unwarranted timidity "is less likely present, or at least is not special, when a private company subject to competitive market pressures" is involved. *Id.* at 409.

While the record does not contain the particulars of Filarsky's contract with the City of Rialto, it appears that these marketplace pressures are present.

The City of Rialto can hire any private investigator it wishes to investigate complaints of employee misconduct. Indeed, Filarsky's brief, as well as that of *amici curiae*, is chock-full of references to the growing number of cities contracting out for services with private employers. And there is no shortage of private investigators.

As a private investigator hired by the City, Filarsky is a profit-seeking market participant. That is, he faces competition; thus, he must perform efficiently and effectively to retain business. Also, California Rule of Professional Responsibility 3-410 requires attorneys who do not carry professional liability insurance to provide notice of that fact to their clients. These marketplace pressures provide an incentive for the City to hire an effective attorney and/or an attorney who carries his own liability insurance.

Unlike Filarsky, "government employees typically act within a *different* system. They work within a system that . . . is often characterized by multi-department civil service rules that, while providing employee security, may limit the incentives or the ability of individual departments or supervisors flexibly to reward, or to punish, individual employees." 521 U.S. at 410-411. Accordingly, there exists no special immunity-related need for the City's privately-contracted personnel investigators, even if they happen to be attorneys, to prevent timidity or encourage vigorous performance.

Indeed, the Court has previously recognized the role played by private markets in considering *Richardson*'s policy rationales. "Privatization helps to meet the immunity-related needs to ensure that talented candidates are not deterred by the threat of damages suits from entering public service." *Id.* at 411 (internal quotation marks and citations omitted). As discussed above, the fact that Filarsky operates outside of civil service restraints, allows the City of Rialto to offset increased employee liability risk with higher pay or extra benefits. As a result, Filarsky, and his competitors, can operate as private firms instead of like typical government departments.

The final policy consideration underlying governmental immunity is whether lawsuits might distract employers from their duties. *Id.* at 411-412. However, "the risk of 'distraction' alone cannot be sufficient grounds for an immunity." *Id.* (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982)). In considering this policy consideration, the *Richardson* Court stated:

> Given a continual and conceded need for deterring constitutional violations and our sense that the firm's tasks are not enormously different in respect to their importance from various other publicly important tasks carried out by private firms, we are not persuaded that the threat of distracting workers from their duties is enough virtually by itself to justify providing an immunity.

Id. at 412.

Here, the threat that investigators hired by the City to investigate allegations of employee misconduct will be subjected to a barrage of distracting litigation for violating employees' civil rights is speculative, at best. For one thing, qualified immunity's application to someone in Filarsky's position is only an issue where the Constitutional right is not *clearly* defined. For another, any such litigation is certainly less likely than the distraction a malpractice action may cast.

In short, there is nothing about the job of conducting administrative investigations into personnel complaints that warrants providing Filarsky with governmental immunity. His job is one that private industry might, or might not, perform; and which does not have a firmly rooted tradition of immunity applicable for private actors. Because there are no special reasons significantly favoring an extension of governmental immunity, and indeed the express policy rationales of *Richardson* are not advanced by Filarsky's inclusion, the Court should hold that Filarsky, unlike those who work directly for the City of Rialto, does not enjoy immunity from suit under Section 1983.

III. Filarsky's Proposed Test Is Arbitrary And Unworkable Because It Misconstrues History, Ignores Qualified Immunity's Purposes, Denies The Market Realities Of Workplace Investigations, Ignores This Court's Previous Admonishments Against "Functional" Tests, And Would Disrupt Working Precedent Without Good Reason

Attempting to escape the test provided in *Richardson*, Filarsky argues the proper test should instead be whether the attorney is the functional equivalent of a government employee based on the nature of the advisory or representative role the attorney performs; the control exercised by and close coordination with government employees or officials; the role that the attorney's legal counsel plays in the execution of an essential governmental activity; and the immunity accorded to government employees performing the same role.[5] (Pet. Brief 34) The United States offers a similar, though more narrowly constructed, test. (Brief for the United States as *Amicus Curiae* Supporting Petitioner, 15).

However, none of these tests are "rooted in historical analogy, based on the existence of common-law rules in 1871, rather [they are] 'freewheeling policy choice[s].'" *Wyatt*, 504 U.S. at 170 (Kennedy, J., concurring) (citing *Malley v. Briggs*, 475 U.S. 335, 342

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[5] Filarsky's functional test would ultimately lead to immunity to all private parties hired to conduct any function similar to that of a public employee; perhaps even park maintenance.

(1986). Moreover, neither test satisfies the policies supporting qualified immunity, most notably the most important: preventing unwarranted timidity in carrying out required official duties, *Butz v. Economou*, 438 U.S. 478, 506 (1978). Indeed, there is no evidence Filarsky displayed any timidity.

Rather, Filarsky's approach eliminates consideration of those policies. He offers no real elaboration, only that his approach might be easier and that there should be no distinction based upon whether the person performing the function is a public employee or private. *See also Richardson v. McKnight*, 521 U.S. 399, 415-417 (Scalia, J. dissenting).

Ironically, although he suggests a test highly tailored to his version facts of the facts of this case, in actuality, Filarsky meets none of those prongs: he was simply investigating whether Delia was really sick, neither representing nor advising the city. Nor was there "control exercised by and close coordination" with government officials; to the contrary, Battalion Chiefs Bekker and Peel simply observed the interview in silence "for no particular purpose," and Bekker was there because it was good training for him for internal affairs investigations; Fire Chief Wells was tending to his own responsibilities down the hallway and simply *ratified* Filarsky's order by signing, at Filarsky's request, a document prepared by Filarsky. Finally, Filarsky has not provided any evidence of a history of private persons conducting public workplace inquiries. Even under his own test, Filarsky is not entitled to qualified immunity.

Although Filarsky may argue that somewhere along the line he switched hats from investigator to attorney and was providing legal counsel by assuring the search was "no problem," it is plain that he was self-interested in this advice; he was invested in a particular result–that the search would go forward–particularly after the showdown with Delia's representative. This was hardly the dispassionate and reasoned advice and counsel of a disinterested third party.

A. There Is No Evidence Of A Historical Tradition Of Immunity For Private Parties Conducting Workplace Investigations

Like Delia, Filarsky is unable to find a "'firmly rooted' tradition," *Richardson*, 521 U.S. at 404, of affording qualified immunity to private parties conducting workplace investigations. Indeed, it is unlikely that workplace investigations even occurred when Section 1983 was enacted in 1871; and even less likely that they were conducted by an attorney or a private person. Rather, workplace investigations of public employees would logically seem to be an outgrowth of laws protecting job security, assuring that termination or other discipline was memorialized upon a legitimate and permissible basis.

Filarsky conducted his investigation of Delia for these very reasons. However, "[civil-service laws] did not even exist when § 1983 was enacted. . . ."

Richardson, 521 U.S. at 420 (Scalia, J., dissenting), and this Court did not recognize a right to procedural Due Process before the deprivation of a constitutionally cognizant property interest in public employment until its decision 100 years later in *Board of Regents v. Roth*, 408 U.S. 564, 569-570 (1972). So it is unlikely that prior to 1871, workplace investigations of public employees, if they even existed, justified the cost of hiring of a private party, let alone the cost of talented attorneys such as Abraham Lincoln.[6]

Even though this Court has admonished that "[w]e do not have a license to establish immunities from section 1983 actions in the interests of what we judge to be sound public policy," *Tower v. Glover*, 467 U.S. 914, 922-923, because history does not support qualified immunity in this case, Filarsky proposes that this Court do just that, and reformulates the application of qualified immunity so that private attorneys can have immunity in nearly all instances.

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[6] Although one cannot be sure, it is doubtful that paid sick leave, or even abuse of sick leave, existed back then.

B. Filarsky's Proposed Test Embellishes History, And Supplants The Policy Considerations For Extending Qualified Immunity To Private Persons With A Speculative Theory Not Supported By Market Realities

The consideration of policies supporting qualified immunity is paramount and should underscore its present day application; it allows the Court to realistically evaluate current or changed circumstances (and they have changed) over the past 140 years rather than an approach, as apparently suggested by Filarsky, that is arbitrary for the very reason that it does not distinguish between public and private status, or has been rendered irrelevant, or which yields results against which policy considerations counsel. It is for these reasons that this Court has stated "we have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law." *Anderson v. Creighton*, 483 U.S. 635, 644-645 (1987). And it is for these reasons that this Court, when asked to further extend qualified immunity into the private sector–and here Filarsky essentially asks this Court to extend qualified immunity to all private attorneys who do business with the government, must consider whether the "rationales mandating qualified immunity for public officers are . . . applicable to private parties." *Wyatt v. Cole*, 504 U.S. 158, 167 (1992).

As noble a profession as the law may be, it is also a business. For example, municipal law is usually but one area of practice in a large firm; such a firm may also have a corporate governance, finance, antitrust, tax, construction, appellate, insurance law and other practice. It is beyond speculation to argue, as do Petitioner, the United States, and assorted *amici*, that associates and partners employed by such firms will abandon their municipal practices for the reason that they are not entitled to qualified immunity for workplace investigations, all the while still having to defend against claims of violations of "clearly established" law and even malpractice claims from any one of their clients in any of a number of areas of law.

Truth to tell, and in light of the above, the private bar cannot muster a credible, fact-based argument that denial of qualified immunity for workplace investigations will have a palpable impact on their practices, or will dampen their ardor or resolve to deliver for their clients, or how it would realistically hamper the "government's ability to perform its traditional functions," *Wyatt v. Cole*, 504 U.S. 158, 167 (1992) by securing talented counsel. Talented attorneys and investigators already rise to the top of the profession, and through market pressures must offer competitive rates.

The doomsday scenario painted by Petitioner and *amici* League of California Cities and the California State Association of Counties, whereby droves of attorneys will flee the municipal law landscape and the few who remain will drive up the price of workplace investigations, is pure speculation. For it is difficult to imagine why, if private attorneys are already susceptible to liability for violations of clearly established law, not to mention malpractice–*a potential distraction in every attorney-client relationship*–the lack of the defense of qualified immunity alone is going to tip the scale and make the "burdens of governmental representation become too high." Brief for Petitioner 49. Indeed, these predictions have not materialized since the Ninth Circuit denied Filarsky qualified immunity.

Thus, it is not enough to examine whether the private law firm is "working alongside or under close supervision of government officials" as the United States and Filarsky suggest. First, that may at times require an intense factual inquiry that would circumvent the purpose that qualified immunity be not just a defense, but immunity from suit. *Developments in the Law–State Action and the Public/Private Distinction: Private Party Immunity from Section 1983 Suits* 123 Harv. L. Rev. 1266, 1271 (2010). Like the subjective intent inquiry abandoned by this Court in *Harlow v. Fitzgerald*, whether the private law firm was working "alongside or under close supervision" at a specific time is a question of fact "inherently requiring resolution by a jury." *Harlow v. Fitzgerald*, 457 U.S. at 816.

And it would be difficult enough to uniformly agree on exactly what it means to work under close supervision. Indeed, it is doubtful there ever is close supervision; after all, private attorneys are purportedly retained by public agencies for their expertise and guidance, and not to be closely supervised on a factory assembly line. Filarsky certainly was under no supervision whatsoever; he was in complete control of the interview and insisted to all three Chiefs, who were concerned with his approach, that his approach was "no problem."

The private bar's "close supervision" proposal is better suited for "private party acts that are isolated, taken at the specific direction of the government, or done without profit or other marketplace incentive. *See, e.g., Mejia v. City of New York*, 119 F. Supp. 2d 232, 266-268 (E.D.N.Y. 2000) (qualified immunity for 'private actors enlisted by law enforcement officials to assist in making an arrest' because marketplace pressures absent for those whose assistance is 'brief and isolated' and 'not compensated'); *Calloway v. Boro of Glassboro Department of Police*, 89 F. Supp. 2d 543, 557 n. 21 (D.N.J. 2000) (qualified immunity for private citizen 'asked to participate in a single criminal investigation . . . acting under supervision of the [government] investigators.'); *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 73 (2d Cir. 1998) (qualified immunity for private administrators of federal Medicare claims in their efforts to detect Medicare fraud because such efforts are required by law and the administrators have 'no personal financial interest' in the pursuit of such fraud.)." *Bender v. General Services Administration*, 539 F. Supp. 2d 712, 714 (S.D.N.Y. 2008); *see also Richardson*, 521 U.S. at 413.

Such isolated, ephemeral instances stand in sharp contrast to the continuous 10 year profitable relationship Filarsky & Watt had (and continues to have) with the City of Rialto at the time of the interview (Petition 88-89), and whatever simultaneous engagements the partnership has with other public and private agencies.

C. Because Policy Considerations For Absolute Immunity Differ From Those Underscoring Qualified Immunity, They Do Not Provide A Sufficient Corollary For Extending Qualified Immunity To Private Defendants

Filarsky argues that because absolute immunity in the judicial and quasi-judicial setting applied to private attorneys, qualified immunity should apply to attorneys whose law firms have public agency clients. Petitioner's Brief on the Merits, 24-26. *Richardson* also noted private individuals serving as grand jurors and witnesses are entitled to absolute immunity, and posited that it would be unlikely the Court would deny prosecutorial immunity to private attorneys retained to conduct high profile criminal prosecutions. *Richardson*, 521 U.S. 417-418 (Scalia, J. dissenting). Indeed, *amicus curiae* in support of Petitioner has noted "'American citizens continued to privately prosecute criminal cases in many locales during the nineteenth century. . . . Thus, "[p]arents of young women prosecuted men for seduction; husbands prosecuted their wives' paramours for adultery; wives prosecuted their husbands for desertion."' John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors* 47 Ark. L. Rev. 511, 518 (1994)." Brief of DRI 11. And Filarsky reminds us that the late President Abraham Lincoln, while in private practice, was appointed prosecutor in a rape case. Brief for the Petitioner 19.

But absolute immunity has been reserved for "special functions," *Butz v. Economou*, 438 U.S. 478, 508 (1978), where it is "'better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.'" *Imbler v. Pachtman*, 424 U.S. 409, 428 (1976) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (C.A. 2 1949), cert. denied, 339 U.S. 949 (1950)).

Therefore, at common law no prosecutors were immune for suits for malicious prosecution and defamation, including the knowing use of false testimony before the grand jury and at trial. *Burns v. Reed*, 500 U.S. 478, 485 (1991). And in *Imbler*, 424 U.S. at 431, this Court held that prosecutors are absolutely immune from liability under Section 1983 for conduct in "initiating a prosecution and in presenting the State's case" insofar as that conduct is "intimately associated with the judicial phase of the criminal process." *Id.* at 430. Immunity makes sense there because "suits against prosecutors for initiating and conducting prosecutions 'could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate'" which would divert prosecutors' attention away from their duty of enforcing criminal law, and potential liability "'would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system.'" *Burns*, 500 U.S. at 485-486 (quoting *Imbler*, 424 U.S. at 425, 427-428).

These distinctions, particularly the expectation of frequency of exposure to lawsuits from a resentful criminal defendant upon whom the State's advocate's sights have been set, may justify application of absolute immunity to private persons engaged to perform "special functions" directly connected within the judicial process–a prototypical government function to which an entire article of the United States Constitution is devoted. However, it does not follow that therefore partners of law firms should be entitled to qualified immunity when they are paid to undertake the most mundane of tasks like determining whether an employee was really sick; workplace investigations hardly involve such a "special function" and are as commonplace in the private sector as they are the public sector; moreover, such investigations are more likely to be performed by non-attorney employees.

Today, and historically, there is "nothing special," *Richardson*, 521 U.S. at 412, about workplace investigations. And they are certainly less special than something like being a private prison guard. Nor are workplace investigations a "prototypical governmental function . . . ". *Id.* at 416 (Scalia, J., dissenting). Perhaps as importantly, there are no "marketplace pressures," *Id.* at 409, present in being a grand juror or witness to offset with strong incentives that would cause anyone to undertake these special roles in the judicial process; indeed, witnesses often have no choice but to testify.

Somewhat similarly, although Petitioner points out qualified immunity is extended to private persons serving as school board members, *Wood v. Strickland*, 420 U.S. 308 (1975), Brief for Petitioner 13, this Court noted there that "[m]ost of the school board members across the country receive little or no monetary compensation for their service." *Id.* at 320. According to Petitioner, nearly two-thirds of school board members receive no salary and only 2% receive more than $15,000 per year. Brief for Petitioner 13. Again, there simply is no marketplace pressure present in being an unpaid school board member, and for the handful of school board members who are paid, government is the only "purchaser." *Richardson*, 521 U.S. at 419 (Scalia, J., dissenting). The same cannot be said for workplace investigations conducted by private companies.

D. Filarsky's Test Denies The Reality That Workplace Investigations Is A Competitive Market Comprised Of Non-Attorneys As Well As Attorneys

Filarsky's assertion of a mixed functional-close supervision test would require the Court to extend qualified immunity to non-attorney workplace investigators, and thus "sweeps too far." *Harlow*, 457 U.S. at 810. Private companies, as well as public agencies, conduct their own investigations into allegations of employee misconduct. There is nothing uniquely governmental about it.

Nor is the task always undertaken by an attorney. Non-attorneys, whether they are former police officers or human resources persons, are just as likely to independently conduct and direct workplace investigations. Indeed, some workplace investigations are outsourced specifically for the purpose of creating an appearance of independence in the investigation–thus there is no "hand in glove" or "arm in arm" relationship, or any supervision whatsoever.

Indeed, attorneys, public or private, do not typically conduct employee investigations. Conventional wisdom counsels against it; even Petitioner's counsel does: "There is certainly a legitimate and important role for legal counsel in workplace investigations, especially if the issues involve potential legal liability. The role of counsel, however, will typically be as a behind-the-scenes advisor and consultant, not as an investigator. . . . [D]irect participation in gathering evidence should be avoided in most instances." (*"How to Conduct An Effective Workplace Investigation"* Akin, Gump, Strauss, Hauer & Feld, LLP (April 2001, § II(H), pp. 5-6)).

The use of outside investigators is advised generally only when the agency does not have the resources within its organization; and it is most common where the target of the investigation is a high ranking employee of the organization. (*Id.*, at § II(G), p. 4)

Outside investigators are also used to create the appearance of an independent investigation. For example, former Los Angeles Police Chief William J. Bratton will head an independent investigation into the recent pepper-spraying of student protestors at University of California, Davis. Bratton is now chairman of the New York-based Kroll security consulting firm, which was hired by the university to conduct the investigation. (*"Bratton to Lead Investigation of UC Davis Pepper Spraying"* Los Angeles Times, November 23, 2011) At the time of the Los Angeles Times article, Kroll was still negotiating its fee for the investigation.[7] *Id.*

Indeed, providing investigative and other human resource services to public and private agencies is big business. Kroll security has offices in more than 52 cities in 29 countries, and more than 2,800 employees.[8] It is doubtful that absent the availability of qualified immunity, former Chief Bratton and Kroll will approach the investigation with timidity. The competitive market for employee investigations is thus made up of players of all types, from former non-attorney public officials chairing worldwide firms, to former police officers, to solo practitioners.

---

[7] No doubt Bratton's stature as former Police Chief was instrumental in securing the contract. Filarsky & Watts' pitch is not very different: Filarsky advertises that before becoming an attorney, he handled labor relations for a local Southern California city for three and one-half years; and prior to that he was employed by another local city. (Filarsky & Watt LLP; www.filarskyandwatt.com/filarsky.html).

[8] *"Overview–Kroll Provides Trusted Intelligence and Scalable Technology Solutions,"* www.kroll.com/about/overview.

1. Private Attorneys Contracting With The Government Are Guided By Different Interests Than In-House Public Attorneys

Filarsky attempts to bolster his argument by noting the special fiduciary role of attorneys, and the attorney-oath, asserting that attorneys therefore have the exact same focus of government's interest as does a public employee. Brief for Petitioner 26-28. Yet, there are palpable differences between "in-house" public attorneys and privately contracted attorneys because "government employees typically act within a *different* system." *Richardson*, 521 U.S. at 410 (emphasis in original).

First, their relative motivations are entirely dissimilar. Private attorneys typically develop a practice area. In larger firms, attorneys are expected to fine tune their expertise by developing a specialty or subspecialty, and then command a market share of clients, and raise their hourly rates. *"Should I Go In-House?"* Linda Pierce, Northwest Legal Search (2010). They are more self-interested. Without a doubt, there is more money to be made by leaving the public sector, going into private practice and then contracting with the government to provide those same services. Like Filarsky, such attorneys hope to become sought-after for their expertise and have many clients, clients who have variously distinct needs and interests. Hence, there are private attorneys who subspecialize in municipal finance, tax, water rights, land-use, labor and employment and so on. It would be unusual if they had only one client.

By contrast, in-house public attorneys have only one client–their public employer–and are expected to have knowledge in diverse areas of law–a mile wide and an inch deep; they are often present throughout the decision making process, and are often pressed for immediate answers to pressing questions on a wider range of issues than a private attorney. *Id.*

Second, public attorneys are expected to act "solely and conscientiously in a public capacity. . . ." *In re Lee G.*, 1 Cal. App. 4th 17, 29 (1991). Although they are expected to act in a cost conscious manner for the good of the public, public attorneys are not slaves to the billable hour or concerned with becoming upside down in their monthly retainer. This alone makes a privately contracted attorney somewhat less of a team player.

Third, private attorneys are in competition with others to retain the public agency's business. This tends to make them more "results oriented" for their public agency clients. Certainly, Filarsky was results-oriented: one way or another, he was going to get Delia to remove the personal items stored in his home.

Finally, the fiduciary relationship an attorney has with a client simply does not apply to private non-attorneys who conduct workplace investigations. Those "rationales are not transferable," *Wyatt*, 504 U.S. at 168, to non-attorneys.

E. A Functional Approach Analysis Is Not Workable Because Non-Attorneys Also Conduct Workplace Investigations

Filarsky advocates in part the *Richardson* dissent's functional approach. However, "[A] purely functional approach bristles with difficulty, particularly since, in many areas, government and private industry may engage in fundamentally similar activities, ranging from electricity production, to waste disposal, to even mail delivery." *Richardson*, 521 U.S. at 409. This is one of those situations, and would require the Court to eventually extend qualified immunity to non-attorneys as well, creating a brand new and expansive category of qualified immunity. This Court should be reluctant to create such a broad immunity. Allowing Filarsky to avail himself to qualified immunity by applying a framework previously rejected by this Court is inconsistent with the doctrine of *stare decisis*. *See*, *e.g.*, *Payne v. Tennessee*, 501 U.S. 808, 848 (1991) ("The overruling of one of this Court's precedents ought to be a matter of great moment and consequence.").

Notwithstanding this, Filarsky's theoretical entitlement to qualified immunity under such a rejected approach would not cast doubt on the Ninth Circuit's holding. Contrary to Filarsky's assertion, he would not be entitled to qualified immunity even if the Court chose to apply the functional approach discussed in the *Richardson* dissent because conducting workplace investigations is not a "prototypically government function" giving rise to qualified immunity. *Richardson*, 521 U.S. at 416 (Scalia, J., dissenting).

Even the function of the private prison guards in *Richardson* stands in sharp contrast to that of Filarsky, who was employed by the City to conduct a workplace personnel investigation to determine whether Delia was really sick, as he and his doctor's notes supported. Filarsky cannot escape the facts of this case. Unless the duties of private, workplace investigators are stretched so far as to label them integral to the judicial process, Filarsky cannot avail himself to the defense of qualified immunity under the functional approach.

F. Circuit Courts Have Successfully Relied On The *Richardson* Framework And Policy Guidelines

Following *Richardson*, circuit courts have generally, but not always, rejected qualified immunity for private parties. *Bender v. General Services Administration*, 539 F. Supp. 2d 702, 714 (S.D.N.Y. 2008).

In *Tewksbury v. Dowling, M.D.*, 169 F. Supp. 2d 103 (E.D.N.Y. 2001), the court held that private physicians employed by a hospital were not entitled to qualified immunity against a patient's claim of involuntary confinement. Finding no immunity at common law for privately employed physicians who commit individuals suspected of mental illness, *Id.*, at 113, the court examined whether the immunity doctrine's purposes warranted immunity. *Id.* Denying qualified immunity, the Court found "it is clear that Defendants are subject to competitive market pressures and have an incentive to commit patients." *Id.* at 114. Therefore, "'marketplace pressures provide [Defendants] with strong incentives to avoid overly timid, insufficiently vigorous, unduly fearful, or "non-arduous" employee job performance.' *Richardson*, 117 S. Ct. at 2107. Accordingly, like the privately employed prison guards in *Richardson*, the purposes behind the qualified immunity defense do not support its application here." *Id.*

In *Harrison v. Ash, C.O.*, 539 F.3d 510 (6th Cir. 2008), an inmate died in custody after an asthma attack. The court granted qualified immunity to officers employed by a county jail, but denied qualified immunity to private nurses whose employer contracted with the jail. In fact, the court held that the officers were qualifiedly immune because they were entitled to rely upon the medical treatment of the private nurses once they obtained medical care for the decedent. *Id.* at 518. In contrast, the court found that the purposes of qualified immunity do not support extension to the nurses employed by the private medical provider. Under *Richardson*, the court determined that in deterring "unwarranted timidity, the most important rationale underlying qualified immunity," *Harrison*, 539 F.2d at 524, "market forces" operate to ensure the employees effectively execute their duties because the medical provider [like Filarsky & Watt] "must compete with other firms to obtain contracts to provide medical services. . . ." *Id.*

And at the end of its contractual term "it will likely face 'pressure from potentially competing firms who can try to take its place.' [citation]." *Id.* The court also found that "any distraction caused by the threat of suit is certainly no greater than the threat of malpractice suits faced by other medical professionals." *Id.* at 525. Like medical professionals, private attorneys face a similar threat of malpractice suits. Certainly more so than the threat of Section 1983 suits.

On the other hand, in *Sherman v. Four County Counseling Center*, 987 F.2d 397, 405-406 (7th Cir. 1993), a pre-*Richardson* case, the court found that a private psychiatric facility that was ordered by a state court to detain the plaintiff against his will and treat him as it deemed appropriate was entitled to qualified immunity. Its holding was based on the fact that the defendant "acted pursuant to court order on an emergency basis." *Tewksbury*, 169 F. Supp. 2d at 114 (citing *Sherman*, 978 F.2d at 405-406).

Other courts have heeded *Richardson*'s underpinnings so as to not unnecessarily extend immunity where its purposes would not be served. In *Cook v. Martin*, 148 Fed. Appx. 327, 342 (6th Cir. 2005), the court denied qualified immunity for private providers of prison medical services. The court in *Hinson v. Edmond*, 192 F.3d 1342, 1345 (11th Cir. 1999), also denied qualified immunity for a private provider of prison medical services.

In *Malinowski v. DeLuca*, 177 F.3d 623, 624 (7th Cir. 1999), the court denied qualified immunity for privately employed building inspectors. In *Jensen v. Lane County*, 222 F.3d 570, 578 (9th Cir. 2000), the court denied qualified immunity for a provider of psychiatric care services. In *Halvorsen v. Baird*, 146 F.3d 680, 685 (9th Cir. 1998), the court denied qualified immunity for the provider of involuntary commitment services for inebriates. In *Rosewood Services, Inc. v. Sunflower Diversified Services, Inc.*, 413 F.3d 1163, 1169 (10th Cir. 2005), the court denied qualified immunity to a provider of disability benefit services.

These cases, and many others like them, show the extent to which the lower Circuits have successfully implemented *Richardson*, along with the consistent development of the application of its test and sound results reflective of the policy considerations underlying qualified immunity.

IV. Absent Qualified Immunity, Private Parties Like Filarsky May Still Be Able To Assert Good Faith As A Defense To Liability

While qualified immunity provides immunity from suit, substantive defenses may still be available regardless of the existence of immunity. Although the Court should not extend qualified immunity to private parties conducting workplace investigations, the "good faith" defense to Section 1983 liability has been recognized as a substantive defense that this Court has not swept away with its "reformulation" of the qualified immunity analysis.

As this Court noted in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the prior qualified immunity analysis had two distinct aspects: an objective inquiry ("presumptive knowledge of and respect for 'basic, unquestioned constitutional rights'"), and a subjective inquiry ("permissible intentions," or more commonly, "good faith"). *Id.* at 815. *Harlow*, however, eliminated this subjective "good faith" inquiry from the qualified immunity analysis because it was incompatible with prior admonitions that "insubstantial claims should not proceed to trial." *Id.* at 815-816. Thus, in order to avoid "excessive disruption of government" and to "permit the resolution of many insubstantial claims on summary judgment" *Id.* at 818, qualified immunity was reformulated without the subjective inquiry. The Court's approach was designed to create a "threshold immunity question" prior to the fact-intensive and subjective good-faith inquiry. *Id.* Importantly, however, the good-faith defense was still available after the "threshold immunity question."

In *Wyatt v. Cole*, 504 U.S. 158 (1992), this Court noted the distinct nature of the two inquiries in determining whether qualified immunity applied to private persons. There, the Court recognized *Harlow*'s approach to qualified immunity as establishing an "*immunity from suit* rather than a mere defense to liability." *Id.* at 166. Thus, in finding that the defendants in that case were not entitled to qualified immunity, *Wyatt* emphasized that its holding did "not foreclose the possibility that private defendants faced with § 1983 liability . . . could be entitled to an affirmative defense based on good faith." *Id.* at 165. This Court reaffirmed this in *Richardson*, expressly leaving open the possibility that a good-faith defense may apply to defendants denied qualified immunity while expressing no view on it. 521 U.S. at 413-414.

The Court's purpose in moving away from the subjective inquiry prong of qualified immunity was driven by recognition that "subjective faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury." *Harlow*, 457 U.S. at 816. This would result in subjecting "officials to the risk of trial–distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Id.* However, these distractions do not attend lawsuits against private parties, and certainly no more so than a malpractice claim, because they are not government officials; they "hold no office requiring them to exercise discretion," *Wyatt*, 504 U.S. at 168. And "unlike with government officials performing discretionary functions, the public interest will not be unduly impaired if private individuals are required to proceed to trial to resolve their legal disputes." *Id.*

Therefore, this Court may determine that a good faith defense is more appropriate for someone in Filarsky's position.

V. Should The Court Be Inclined To Make Qualified Immunity Available To Private Attorneys, A Reasonable Attorney Standard Should Apply

Although Filarsky and the private bar have shown no historical tradition of immunity for private attorneys conducting workplace investigations, should the Court determine that creating qualified immunity in this situation would further the immunity's policies, the proper objective standard to apply would be "whether an attorney, reasonably well-trained in public employee investigations, would have known that the search of Delia's personal property stored in his home was illegal." The Court's cases provide support for this view. In *United States v. Leon*, 468 U.S. 897, 922, n. 23 (1984), the Court held that in the context of a suppression hearing, a "good faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization." And in *Malley v. Briggs*, 475 U.S. 335, 344 (1986), this Court determined that the objective reasonableness standard applied in suppression hearings "defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest." Thus, the Court determined that the "analogous question" there was "whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." *Id.* at 345. Furthermore, this Court found that even though a magistrate, given "docket pressures," may fail to act properly and not approve the warrant, "ours is not an ideal system" and it is "reasonable to require applying for the warrant to minimize this danger by exercising reasonable professional judgment." *Id.* at 345-346.

Therefore, even though Chief Wells, like the magistrate in ***Malley***, ultimately signed the order presented to him by Filarsky for written ratification, Filarsky should be held to a "reasonably well-trained public employee investigation attorney," as he holds himself out to be, in order to determine whether qualified immunity should apply to him when he applied to the Chief for an order ratifying the search.

If the Court does implement such a standard, this case should be remanded to the District Court for a determination on this issue, using this standard.

VI. The Court Should Affirm The Ninth Circuit Decision On The Basis That Filarsky Violated Clearly Established Law

"A prevailing party need not cross-petition to defend a judgment on any ground properly raised below, so long as that party seeks to preserve, and not to change, the judgment." *Northwest Airlines, Inc. v. County of Kent, Michigan*, 510 U.S. 355, 364 (1994) (citing *Thigpen v. Roberts*, 468 U.S. 27, 29-30 (1984)). Delia asserted below that Filarsky violated clearly established law.

For purposes of qualified immunity, a "clearly established" right exists where "[t]he contours of the right . . . [are] sufficiently clear [such that] a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). It is not necessary that " . . . the very action in question has previously been held unlawful . . . ". *Id.* Rather, a right will be considered "clearly established" where " . . . in the light of pre-existing law the unlawfulness" of the conduct is "apparent." *Id.*

As argued below, prior decisions of this Court support that Filarsky, should be held to a "reasonably well-trained public labor and employment attorney." *See, e.g.*, *United States v. Leon*, 468 U.S. 897, 922, n. 23 (1984); *Malley v. Briggs*, 475 U.S. 335, 344 (1986). In light of substantial case law, in addition to even the general public's basic understanding of the Fourth Amendment, it is hard to believe anyone would not know that if it is unlawful to search a person's home without a warrant, absent justification, they cannot instead compel them to display the contents of their home on the front lawn.

The Fourth Amendment's guarantee against unreasonable government intrusion is a foundational Constitutional right, with origins rooted in British Common Law and the American Colonies' application of that common law. This basic guarantee is so firmly established that it is considered " . . . familiar history that indiscriminate searches . . . conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment." *Payton v. New York*, 445 U.S. 573, 583 (1980).

The Court's recognition of this long history is well documented, for more than "a century ago the Court stated in resounding terms that the principles reflected in the Amendment 'reached farther than the concrete form' of the specific cases that gave it birth, and 'apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life." *Id.* at 585.

A Fourth Amendment "search" occurs when government action intrudes upon a person's "actual (subjective) expectation of privacy," where that expectation "is one that society is prepared to recognize as reasonable." *Katz v. U.S.*, 389 U.S. 347, 361 (1967). This "*Katz* test", first offered by Justice Harlan in his *Katz* concurring opinion, was adopted by the Court's majority in *Smith v. Maryland*, 442 U.S. 735 (1979). The overwhelming amount of established precedent makes Filarsky's unlawful conduct apparent: Delia, like all persons, is entitled to these basic rights; the unlawful intrusion was of his home, an area of strict application of the Fourth Amendment. As such, Delia undoubtedly had an actual subjective expectation of privacy in an objectively reasonable matter. And, because Filarksy's actions amounted to a warrantless search of Delia's home, without a valid exception to that requirement, Delia's Fourth Amendment rights were clearly violated.

Delia's status as a firefighter employed by the City of Rialto does not strip him of Fourth Amendment protection. It is well established that "(s)earches . . . by government employers or supervisors of the private property of their employees . . . are subject to the restraints of the Fourth Amendment." *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987).

It is no small matter that the unlawful conduct here invaded the sanctity of Delia's home, an area *unquestionably* holding the highest of Fourth Amendment protection. Noted unambiguously throughout the Fourth Amendment's history is the idea that "(a)t the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961). The recognition of this basic principle by the Court is common knowledge, for "the search of a home's interior," is "the prototypical . . . area of protected privacy." *Kyllo v. United States*, 533 U.S. 27, 28 (2001). As an attorney, it would beg credulity to suggest that Filarsky had no inclination that his order violated the Fourth Amendment, or that he should not have known. This is especially true when considering the fact that numerous non-attorney persons questioned the legality of his plan.

What force would the Fourth Amendment's guarantees have if instead of invading the home and searching, the Constitution allowed government officials to compel homeowners to empty the personal contents of their home for public display. It seems elementary that such an order is clearly an end-run around the Fourth Amendment. While Filarsky ordered Delia to only display the unpackaged insulation, under Filarsky's logic he could have ordered Delia to empty every space in his home where the insulation might be, including the spaces between the walls–all just to prove Delia was not sick and *did* install the insulation. To the average citizen, this potential power by the government is extremely invasive, and amounts Filarsky's tactics to *nothing more than a mere crafty manifestation around the very evils the Fourth Amendment was adopted to protect*.

The Court has routinely made it " . . . clear that the reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." *Katz v. United States*, 389 U.S. 347, 353 (1967). The Court has repeatedly and unambiguously reaffirmed this application. Thus, the Fourth Amendment will apply to the government's identification of a single object inside one's home, even where agents do not physically enter, *United States v. Karo*, 468 U.S. 705 (1984); and the Fourth Amendment applies to use of a "thermal imaging device" monitoring of home, again even where agents do not physically enter, *Kyllo*, 533 U.S. 27 (2001). Even ordering a person to "empty their pockets" falls within the Fourth Amendment's ambit. *United States v. Foust*, 461 F.2d 328 (7th Cir. 1972), among others. This is no different from ordering one to "empty" the contents of their home.

Filarsky, like Delia, his attorney, Battalion Chief Bekker, Battalion Chief Peel, and Fire Chief Wells, should have at least reflected upon this grave decision. Had he done so, he likely would have recognized the clear unlawfulness of his orders.

◆

CONCLUSION

The judgment of the court of appeals should be affirmed for the reasons that (a) under this Court's precedents, neither history nor policy considerations support applying qualified immunity to private parties conducting workplace investigations; and (b) Filarsky violated clearly established law. If, on the other hand, this Court determines Filarsky is at least eligible for qualified immunity this Court should remand the matter to the District Court for a determination on that issue.

Respectfully submitted,

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REPLY
BRIEF

RECORD
AND
BRIEFS

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FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

To whom exactly respondent and his amicus believe that qualified immunity applied in 1871 is left unexplained. Amicus the American Association for Justice ("AAJ") insists (Br. 15-20) that immunity must be woodenly confined to those persons formally employed in governmental service. But, as respondent admits (Br. 9, 24-25), there was no such established civil service at the time Section 1983 was enacted. Instead, many governmental functions now performed by civil service employees and routinely accorded qualified immunity were undertaken in 1871 by private individuals who, like petitioner, temporarily took on a public role. *See* Pet. Br. 14-21;

U.S. Br. 27-29. That is why *Richardson v. McKnight*, 521 U.S. 399 (1997), left open qualified immunity's application to individuals who "serv[e] as an adjunct to government in an essential governmental activity, or act[] under close official supervision," *id.* at 413. If immunity did not apply to individuals serving government in that capacity when Section 1983 was enacted, it would have offered meager protection to the government.

AAJ responds (Br. 10-13) that immunity should be denied so that plaintiffs can pursue their damages claims under Section 1983. But the issue in this case is whether, when Section 1983's immunity principles *already bar a suit from going forward* against every government employee involved, those same immunity principles idiosyncratically leave the sole, non-governmental co-defendant singularly liable for defending all of the litigation and paying all of the damages arising out of that "state" action. That makes no sense at all.

First, because of the private attorney's close coordination with the government, government employees would be forced into extensive participation in the discovery and trial processes, thereby causing the very distraction, intimidation, and resource loss to the government that qualified immunity is meant to prevent.

Second, given the broad limitations on private insurance coverage and indemnification for constitutional torts and principles of joint and several tort liability, AAJ's economic theory, even if true, would often leave the government paying exactly the same damages award that it would have paid if a recovery against the governmental defendants had not been barred by qualified immunity. In any event, AAJ is just wrong in assuming that federal, state, and local governments can freely dispense *ex ante* open-ended promises of indemnification to retained private attorneys.

Finally, and most importantly, respondent's and AAJ's position rests critically on the supposition that the intimidating and chilling impact of litigation on the retained attorney can be hermetically confined to that attorney's private practice. It cannot. When private attorneys work in close coordination with or under the supervision of governmental personnel performing essential public services, threatened litigation that chills those attorneys' tough judgment calls, fuels their hesitancy, and compounds hard decisions and close calls with the risk of crippling personal liability necessarily impairs the advice and information that the government receives. And that, in turn, corrodes the government's own ability to make fully informed decisions or to implement needed actions. In other words, when the work of the retained attorney and the government employees is woven closely together, unraveling the protection from litigation for one unravels the protection for all.

I. QUALIFIED IMMUNITY EXTENDS TO PRIVATE ATTORNEYS WHO ARE ENGAGED TO PERFORM ESSENTIAL PUBLIC SERVICES IN COORDINATION WITH OR UNDER THE CLOSE SUPERVISION OF THE GOVERNMENT

A private attorney like petitioner who works as an adjunct in coordination with or under the close supervision of public employees in performing essential governmental activities should share the same immunity that the government employees enjoy. *See* U.S. Br. 15 (immunity available when a private party "(1) has been retained by government to assist in serving public interests, and (2) works alongside or under close supervision of government officials").

A. Immunity Is Tied To The Protection Of Governmental Decision-making And Activities, Not The Defendant's Status

Neither respondent nor its amicus defends the Ninth Circuit's categorical exclusion of private attorneys from immunity under Section 1983 (Pet. App. 27). Quite the opposite, they both acknowledge that private attorneys engaged to prosecute criminal cases are entitled to the exact same immunity—absolute immunity—that is accorded government prosecutors under Section 1983. Resp. Br. 30-32; AAJ Br. 18-19. They just refuse to extend that same reasoning to qualified immunity. Precedent and history, however, provide attorneys retained by the government equivalent access to qualified immunity.

1. History Supports Qualified Immunity

Respondent argues (Br. 25) that qualified immunity is not available because there is no case from the 1800s according immunity to private actors conducting "workplace' investigations of public employees." That is a straw man. Respondent seeks relief for petitioner's participation in an alleged "search" conducted in violation of the Fourth Amendment, J.A. 19, 23; Resp. Br. 46-51, to which qualified immunity principles have long applied. *See Pearson v. Callahan*, 555 U.S. 223, 243-244 (2009); *Anderson v. Creighton*, 483 U.S. 635, 639-641 (1987). To be sure, petitioner did not—could not, J.A. 172—order that "search," nor did he participate in it. He simply gave legal advice to his clients about the legality of an order to produce evidence during an investigation, J.A. 78, 84, 157. But that purely background role simply underscores the substantive weakness of respondent's claim on the merits; it has nothing to do with qualified immunity's application to alleged searches.[1]

Beyond that, respondent's quest for a workplace-investigation case proves too much and too little. It proves too much because there is no 19th-century case according such immunity to governmental employees either. Yet respondent does not—and could not—dispute that the qualified immunity doctrine extends to the government's "administrative employment decisions." *Hafer v. Melo*, 502 U.S. 21, 29 (1991) (citing cases); *Forrester v. White*, 484 U.S. 219, 229-230 (1988).

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[1] In any event, "'traditional' legal work" includes the "examination of witnesses," *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 558 (1986), and the investigative activities of lawyers also merit qualified immunity, *Buckley v. Fitzsimmons*, 509 U.S. 259, 275-276 (1993); *Burns v. Reed*, 500 U.S. 478, 492-493 (1991).

Indeed, if an on-point, pre-1871 court decision were required for qualified immunity, the doctrine's application would be excruciatingly narrow. It would exclude prosecutorial immunity because the first case recognizing that came 25 years *after* Section 1983's enactment. *See Imbler v. Pachtman*, 424 U.S. 409, 421 (1976) (citing *Griffith v. Slinkard*, 44 N.E. 1001 (Ind. 1896)). Immunity also would have little application to the police since police departments did not even begin to develop until the mid-1800s. *See* David A. Sklansky, *The Private Police*, 46 UCLA L. Rev. 1165, 1206-1207 (1999). And it certainly would not extend to the actions of food or drug inspectors, transportation security officials, or the conduct of electronic surveillance (*Mitchell v. Forsyth*, 472 U.S. 511 (1985)), none of which existed in 1871.

The question under Section 1983 thus has never been the perfect identity of case law, but whether "general principles of tort immunities and defenses" *and* the "interests behind [them]" would have barred suits of the type at hand. *Imbler*, 424 U.S. at 418, 421; *see Burns v. Reed*, 500 U.S. 478, 493 (1991) ("'[T]he precise contours of official immunity' need not mirror the immunity at common law"; instead, "the common law and other history [provide] guidance * * * [in] discern[ing] Congress' likely intent[.]").

And in that regard, respondent's argument proves far too little. When Section 1983 was enacted, the only way that common law immunities and defenses could effectively protect governmental operations was to protect the vast swath of private individuals who assumed those roles prior to the development of a professional civil service. That is why 19th-century case law provided immunity for individuals who did everything from prosecuting criminal cases, to arbitrating private civil disputes, to assisting civil law enforcement, to "executing the orders of the city," *Dunn v. Mellon*, 23 A. 210, 210-211 (Pa. 1892)—all without regard to the individual's public or private status. *See* Pet. Br. 22-28, 38-39 (citing cases); *Ford v. Williams*, 13 N.Y. 577, 584-585 (1856) (where attorney "act[ing] only in the execution of the duties of his * * * profession, * * * does not actually participate in the trespass he is not liable"). This Court too has extended immunity to individuals who maintain dual public/private roles. *See Bogan v. Scott-Harris,* 523 U.S. 44 (1998) (city council member); *Wood v. Strickland,* 420 U.S. 308 (1975) (school board member).

Given that case law, the first-hand experience of the Members of Congress that enacted Section 1983 performing the same type of temporary governmental representations as petitioner, *see* Pet. Br. 20-21, and respondent's failure to cite *any* historical evidence in any form from any source supporting his cramped vision of immunity principles, there is no logical basis for concluding that the common law would have carved out searches during "workplace investigations" for differential treatment.

Respondent's reliance (Br. 16-17) on *Tower v. Glover*, 467 U.S. 914 (1984), makes no sense. *Tower* addressed the absolute immunity of public defenders representing *private* clients, not qualified immunity for representing the government. *Id.* at 916. Public defenders, moreover, advance their clients' private interests, not the government's interests, *Polk County v. Dodson*, 454 U.S. 312, 318-319 (1981), and "perform[] a job without government supervision or direction," *Richardson*, 521 U.S. at 409.

That is the exact opposite of petitioner's claim to immunity, which rests on the same ground as that of the fire department officials: petitioner directly served a governmental client in close coordination with its discretionary conduct of a civil law enforcement investigation, and did so under a fiduciary duty to advance the government's interests exclusively, and not his own. *Cf.* J.A. 20 (Complaint alleges that the City delegated to the defendants, including petitioner, its "policy-making authority" and "adopted and ratified each of [his] decisions").

Richardson specifically acknowledged that "the [common] law *did* provide a kind of immunity for * * * lawyers who performed services at the behest of the sovereign," 521 U.S. at 407. That is because a retained lawyer's "19th-century counterpart" was a government lawyer who enjoyed qualified immunity, not "a privately retained lawyer" representing a private client, *Tower*, 467 U.S. at 921, or serving his own private interest like the for-profit businesses in *Richardson*, 521 U.S. at 407, and *Wyatt v. Cole*, 504 U.S. 158, 160, 168 (1992). *See Forrester*, 484 U.S. at 223 (immunized actions "above all are informed by considerations other than the personal interests of the decisionmaker").[2]

2. *Qualified Immunity Insulates Governmental Decisions and Their Implementation*

AAJ argues (Br. 18-20) that the extension of immunity to private attorneys is woodenly confined to absolute prosecutorial immunity, and that qualified immunity is categorically off limits. That is wrong for three reasons.

First, if AAJ were correct, then this Court's decisions in *Wyatt*, *supra*, involving private replevin plaintiffs, *Tower*, *supra*, involving public defenders, and *Richardson*, *supra*, involving private prison guards, would have been simple, short, absolutist holdings, rather than the caveated and "very narrow," context-specific analyses that this Court undertook, *Wyatt*, 504 U.S. at 168; *see Richardson*, 521 U.S. at 413; *Tower*, 467 U.S. at 920-923. And this Court's references in *Richardson* to the historical tradition of immunity for attorneys working at the behest of the government, 521 U.S. at 407, 413, would have been an utterly pointless tease.

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[2] *Tower* actually supports immunity here. The 19th-century case law that this Court relied on shows that, while attorneys could be liable at common law for deliberately defrauding their own clients, *see Baker v. Humphrey*, 101 U.S. 494, 499-502 (1879), they enjoyed a protection against malpractice claims very much like modern qualified immunity, as "attorney[s] [were] not liable for errors in judgment upon points of new occurrence, or those of nice and doubtful construction," *Von Wallhoffen v. Newcombe*, 10 Hun. 236, 240 (N.Y. Sup. Ct. 1877) (cited in *Tower*, 467 U.S. at 921). *See also Citizens' Loan, Fund & Sav. Ass'n v. Friedley*, 23 N.E. 1075, 1076 (Ind. 1890) (attorney may not "be held liable for a mistake in reference to a matter in which members of the profession possessed of reasonable skill and knowledge may differ as to the law, until it has been settled in the courts") (citing additional cases).

Second, AAJ's proposed asymmetrical treatment of access to absolute and qualified immunity ignores this Court's repeated holdings that prosecutors (private or not) sometimes enjoy only qualified, rather than absolute, immunity, such as when making fact statements in affidavits, *Kalina v. Fletcher*, 522 U.S. 118, 129-130 (1997), providing legal advice to police, *Burns*, 500 U.S. at 492-496, or investigating facts, *Buckley v. Fitzsimmons*, 509 U.S. 259, 276 (1993) ("When the functions of prosecutors and detectives are the same, as they were here, the immunity that protects them is also the same.").

AAJ's position thus would require this Court either (i) to wrench private prosecutors between absolute immunity for one activity and absolutely no immunity for another (like advising law enforcement), or (ii) to create a brand new species of prosecutor-only immunity that would be portable across the public/private lawyer divide in a way that all other immunity protections would not be. Either approach would be made up entirely out of whole cloth, rather than by the reference to "'history and reason'" that this Court's precedent requires. *Buckley*, 509 U.S. at 268.

Third, dichotomizing the treatment of private attorneys based on which level of immunity they seek, absolute or qualified, would require this Court, for the first time, to dissever absolute and qualified immunity from their common purpose and to upset a host of precedent in the process. That is because, while absolute and qualified immunity provide different *degrees* of protection for governmental functions, the operative *purpose* for both immunities in Section 1983 has always been the same: to "protect[] 'government's ability to perform its traditional functions,'" to "'encourag[e] the vigorous exercise of official authority,'" and to foster "'principled and fearless decision-making.'" *Richardson*, 521 U.S. at 408 (quoting, respectively, *Wyatt*, 504 U.S. at 167; *Butz v. Economou*, 438 U.S. 478, 506 (1978); *Wood*, 420 U.S. at 319); *see also Imbler*, 424 U.S. at 424-426 & n.24.

Those "policy consideration[s]" "pervade the analysis," whether "absolute or qualified" immunity is at issue. *Scheuer v. Rhodes*, 416 U.S. 232, 241-242 (1974); *see Harlow v. Fitzgerald*, 457 U.S. 800, 806-807 (1982) (both immunities protect against "potentially disabling threats of liability"). That is because "the public interest requires decisions and action to enforce laws for the protection of the public," and the immunity doctrine ensures that "[p]ublic officials, whether governors, mayors or police," who enjoy qualified immunity, or "legislators or judges," who enjoy absolute immunity, do not "fail to make decisions when they are needed," and do not fail "to implement decisions when they are made," *Scheuer*, 416 U.S. at 241-242, out of fear of being "'mulcted in damages,'" *id.* at 245 (quoting *Pierson v. Ray*, 386 U.S. 547, 555 (1967)).

Accordingly, because "immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches," *Forrester*, 484 U.S. at 227, the court of appeals erred in making dispositive the public or private "identity of the actor who performed" the state action at issue, *id.* at 229. Instead, given that Section 1983 was enacted at a time when many governmental roles were performed by private individuals temporarily engaged in public service, the availability of qualified immunity necessarily turns not on private status, but on the role that the individual performs within governmental operations and the harm to the proper functioning of the *government* that uncabined personal damages liability for even reasonable errors in decision-making would inflict.

This Court thus denied immunity in *Wyatt* not because of the defendant's private status per se, but because "the public interest will not be unduly impaired" by personal liability since private replevin plaintiffs do not "exercise discretion" on behalf of the government, "nor are they principally concerned with enhancing the public good." 504 U.S. at 168.

Likewise, in *Richardson*, what was critical was that the government had outsourced prison management, taking the very day-to-day discretionary decision-making and conduct that qualified immunity is meant to protect out of the government's hands and putting it in private hands, with only "limited direct supervision by the government." 521 U.S. at 413. It was for that reason that a denial of immunity would not impair the "'government's ability to perform its traditional functions'" or "'to serve the public good.'" *Id.* at 408; *see Tower*, 467 U.S. at 921 (public defenders analogized to "a privately retained lawyer").

In short, this Court's qualified immunity decisions involving non-governmental defendants have denied immunity not because of the defendants' private identity, but because the nature of the actions at issue in each case did not implicate the proper functioning and discretionary conduct of the government in the performance of its governmental activities. Because petitioner, by contrast, is being sued for decisions made while embedded with the government and in close coordination with the government's conduct of an investigation into employee misconduct implicating the public fisc and the public trust, this case is exactly the opposite, and qualified immunity is necessary to protect the government's ability to govern.

B. Applying Qualified Immunity To Temporarily Retained Attorneys Protects Governmental Operations And Decision-making

Respondent devotes substantial effort (Br. 26-30) to debating the economic effect of Section 1983 liability on petitioner's personal private law practice. There is a litany of problems with that argument, not the least of which is that it answers the wrong question. Immunity addresses "the special policy concerns involved in suing government officials," *Wyatt*, 504 U.S. at 167, and, in particular, the effect that the threat of open-ended personal liability would have on the "'government's ability to perform its traditional functions,'" *Richardson*, 521 U.S. at 408 (quoting *Wyatt*, 504 U.S. at 167). And the United States, 27 States, and the District of Columbia, along with a host of local governmental bodies, have uniformly advised this Court that imposing personal-damages liability on the governments' temporarily retained attorneys for reasonable decision-making would have a critical "bearing on whether public officials are able to act forcefully and decisively in their jobs" and "to perform [their] traditional functions," *Wyatt*, 504 U.S. at 167-168; *see* U.S. Br. 16-22; Br. of State of Kansas, *et al.* 16-20; Br. of National School Boards Ass'n *et al.* 7-18, 24-28.

First, the whole point of Section 1983 is to promote governmental compliance with the "rights, privileges, or immunities secured by the Constitution and laws[.]" 42 U.S.C. § 1983. Ensuring that the government has access to counsel who can provide the unflinchingly candid, informed, experienced, and skilled legal support that the public interest necessitates is thus both vital to the effective functioning of the government and consistent with Section 1983's animating purpose. Governments as large as the United States and as small as the smallest school board rely critically on temporarily retained private attorneys to meet many of their needs for legal services in a manner that best protects the public fisc, while giving the government fair access to specialized legal capabilities. *See* U.S. Br. 19-20; National School Boards Ass'n *et al.* Br. 10-15; Br. of Kansas, *et al.* 18; ABA Br. 6-12.

Accordingly, litigation that impairs the government's access to skilled attorneys—whether by making the expense cost-prohibitive, by deterring private attorneys from taking on governmental clients, or by forcing attorneys to undertake their work "with an excess of caution" because of the risk of open-ended personal liability *to third parties*, *Forrester*, 484 U.S. at 223—will directly impair the ability of government to do its job. As this case illustrates, litigation that aims to police the content of legal advice provided to the government has a necessary and direct impact on what advice the government receives and the quality of decisions that government officials can make. *See* U.S. Br. 8 ("[A]ny effect on the quality of petitioner's legal advice would necessarily affect the decisions of the public officials who rely on that advice."). And "'preserv[ing]' the ability of government officials 'to serve the public good'" in that manner is a key purpose of the immunity doctrine. *Richardson*, 521 U.S. at 408.

Second, subjecting an attorney to years of litigation and liability for damages at the hands of any third party affected by *government* actions taken following that lawyer's consultations will largely unravel all of the protections that the qualified immunity doctrine was supposed to afford the government. Precisely because the lawyer served as an adjunct to government, litigation challenging that legal advice will engulf government employees in the "wide-ranging, time-consuming" discovery and trial processes, both as key witnesses and as the central source of sought-after evidence. *Harlow*, 457 U.S. at 817 n.29 (internal quotation omitted).

In addition, reasonable discretionary decision-making and governmental conduct that did not cross any clearly established constitutional lines will become the focal point of courtroom adjudications, jury second-guessing, and damages determinations, with plaintiffs probing "into traditionally protected areas, such as [employees'] deliberations preparatory to the formulation of government policy and their intimate thought processes and communications[.]" *Harlow*, 457 U.S. at 817 n.29 (internal quotation omitted). And all that without the government there as a party to defend its own conduct. That will severely discourage rather than "encourag[e] the vigorous exercise of official authority," *Butz*, 438 U.S. at 506, and will chill "principled and fearless decision-making" by government officials themselves, *Wood*, 420 U.S. at 319, just as it "inhibit[s] * * * discretionary" judgments by the attorney who advises them, *Harlow*, 457 U.S. at 816.

Third, AAJ's proposed indemnification solution (Br. 24) makes things worse, not better. Even assuming that open-ended governmental indemnification were readily available (it is not), that would simply foist back onto the government's—and taxpayers'—shoulders all of the damages liability that the qualified immunity afforded to the governmental defendants was supposed to avert. There is little point in according government defendants themselves qualified immunity if the price of obtaining legal counsel is that the government still must endure all the rigors and distractions of discovery, divert employees from their work to appear as witnesses, put their discretionary decision-making and conduct on trial, and pay damages judgments, whether directly through indemnification or indirectly through significantly increased fees. "The imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious * * * decisionmaker[.]" *Wood*, 420 U.S. at 319-320. *Cf. Boyle v. United Techs., Corp.*, 487 U.S. 500, 512 (1988) ("It makes little sense to insulate the Government against financial liability for the judgment * * * when the Government produces the equipment itself, but not when it contracts for the production.").

In any event, respondent's and AAJ's supposition about the protective value of indemnification or malpractice insurance is wrong.

To begin with, there are substantial limitations on the ability of governments to enter, *ex ante*, into the type of open-ended indemnification agreements that would be needed to insulate attorneys against the potential raft of third-party claims for compensatory and punitive damages that could arise from the government's actions. The need for a legislative waiver of sovereign immunity to obligate the treasury, as well as prohibitions on indemnification that have been imposed by statute or case law, together broadly constrain the ability of executive officials to commit the government in advance to uncapped damages liability. *See, e.g., CSX Transp. Inc. v. City of Garden City*, 588 S.E.2d 688, 690 (Ga. 2003) ("no statutory authority for the City to waive its sovereign immunity by entering into a contract of indemnity"); Adequacy of Appropriations Act, 41 U.S.C. § 11(a) (contractual obligation must be authorized "under an appropriation adequate to its fulfillment"); Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1)(A) (forbidding the obligation of funds not already appropriated); *Indemnification Agreements and the Anti-Deficiency Act*, 8 Op. Off. Legal Counsel 94, 98 (1984) (limiting indemnification "for losses resulting from [certain contractors'] own tortious acts").[3]

Malpractice insurance (Resp. Br. 19) is no help either. The system of insurance in Tennessee that avoided the impairment of governmental operations in *Richardson*, 521 U.S. at 410-411, does not exist for attorneys. *See* Pet. Br. 50-51 & n.12 (noting exclusions for constitutional claims, policy limitations, and prohibitions on punitive-damages coverage).

More fundamentally, malpractice insurance is generally tailored to cover a lawyer's services to his or her own clients. It is not configured to insure against open-ended liability to *third parties* based not on the lawyer's conduct alone, but solely on the fact that the lawyer's work is done in service of the government and "the public at large," *Wyatt*, 504 U.S.

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[3] *See also Henisse v. First Transit, Inc.*, 247 P.3d 577 (Colo. 2011); *Hunte v. Blumenthal*, 680 A.2d 1231, 1233 (Conn. 1996); *Insurance Co. of N. America v. District of Columbia*, 948 A.2d 1181, 1186 (D.C. 2008); 5 Ill. Comp. Stat. 350/1(b) (2011); Kan. Stat. Ann. § 75-5946(c) (2011); Miss. Op. Att'y Gen. No. 2006-0610, 2006 WL 1900660 (2006); N.J. Stat. Ann. §§ 59:1-3 (West 2011), 59:10-1, 59:10-2; N.Y. Pub. Off. Law § 17 (McKinney 2011); 2002 N.D. Op. Att'y Gen. No. L-21 (2002); Okla. Stat. title 51, § 155 (2011); Utah Code Ann. §§ 63G-7-102(c) (West 2011), 63G-7-902.

at 168. Nor is such insurance designed to protect the attorney who is left singly responsible not just for his own damages, but for *all* damages caused by immune state actors.

Finally, respondent's exegesis on the law business (Br. 18-20) is predicated on the quite dubious assumption that state and local governments and their taxpayers are price insensitive. *See, e.g.*, Resp. Br. 20 (contending that the City can just "offset increased employee liability risk with higher pay or extra benefits"). Economic reality says otherwise.[4]

Anyhow, the availability of qualified immunity is not a raw economic calculus. This Court analyzed insurance and incentives in ***Richardson*** as a means of determining whether the liability of an independent contractor would affect the "***government's*** ability to perform its traditional functions," 521 U.S. at 408 (emphasis added), in the narrow situation where the government had completely outsourced day-to-day management and discretionary decision-making to a for-profit business that could only sell its services to governmental clients, *id.* at 409-412. In that unique context, the substantial distance between any Section

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[4] *See, e.g.*, League of California Cities, *et al.* Amicus Br. 4-7 (fiscal inability to pay for in-house counsel spurs need for private counsel); AAJ Br. 17 n.2 ("[S]tate and local governments have increasingly privatized and outsourced their legal work for the past 25 years" because "retaining private attorneys is cheaper."); Michael Cooper, ***More Gloom Lies Ahead for Cities, Report Says***, N.Y. Times, Sept. 27, 2011, at A10 ("survey of city finance officers" predicts "fifth straight year of declining revenues").

1983 litigation and the government's own activities greatly dissipated the need for immunity to protect the government's "ability to perform" the functions it retained for itself, *id.* at 408 (quoting *Wyatt*, 504 U.S. at 167). The only remaining impact on the government's operations was the willingness of businesses to contract with the government and of employees to work for such contractors. *Id.* And that is what prompted *Richardson*'s analysis of "marketplace pressures," *id.* at 409, and insurance protection for private employees, *id.* at 409-412.

Unlike the turnkey operation in *Richardson*, the City here had not decamped. It instead absorbed petitioner into its own ongoing, quintessentially governmental activity of enforcing its civil service laws, protecting the public fisc, and policing fraud. And, by virtue of his fiduciary duty, petitioner's actions were "principally concerned with enhancing the public good," *Wyatt*, 504 U.S. at 168, rather than his private interests. *Cf.* Restatement (Third) of Agency § 1.01 (2006) (agents have a "fiduciary relationship" with the principal to "act on the principal's behalf and subject to the principal's control").

When a private attorney works in close coordination with the government in executing an essential governmental activity, the impact of personal damages liability on the attorney cannot meaningfully be separated from the impact on government officials and operations themselves. The government's ability to obtain legal counsel is just as much impaired as the attorney's ability to give it; the costs and burdens for the private attorney of formulating advice carry through and limit the options and actions the government can take; and the real-world impact of discovery, trial, and money judgments can fall heavily on the government as well as the attorney defendant. *See* J.A. 134 (respondent's counsel attempts to prevent order by threatening that "you [petitioner] are going to get sued and the Department is going to get sued, everybody is going to get named, and they are going to sweat it out as to whether or not they have individual liability").

Respondent's entire policy argument, in other words, is built on the faulty premise that the impact of private attorneys' susceptibility to personal liability can be contained to the private attorneys themselves. That just is not so. When a private attorney is brought in to team with the government in the performance of essential governmental activities, the close coordination of their work means that the impact of personal damages liability on the attorney reverberates through the conjoined governmental activity and employees as well.

Under respondent's view, then, the government gets the worst of all worlds anytime it chooses to obtain legal counsel from a private lawyer: the government's ensuing actions and the discretionary judgment calls involved, no matter how reasonable, will become a fount of litigation and jury second-guessing, consuming in the process the time, attention, and resources of government officials, and saddling the public fisc with full damages liability for close calls (either through indemnification or the substantial fee increases needed to insulate against open-ended damages liability). Nor can the government have any confidence that its interests will be adequately protected in a scheme whereby private individuals are left alone, saddled with sole responsibility for expending their own resources to litigate and defend the constitutionality of the *government's* conduct. *Cf. Camreta v. Greene*, 131 S. Ct. 2020, 2029-2030 (2011) (recognizing importance to government of constitutional judgments about its conduct). At the same time, the willingness of private attorneys to "enter[] public service" even for temporary representations, ***Richardson***, 521 U.S. at 408, and their ability, even if they do, to provide "principled and fearless" counsel, ***Wood***, 42 U.S. at 319, will be gravely threatened by the knowledge that they alone will be left litigating and holding the liability bag for the government's actions.[5]

II. RESPONDENT'S OTHER ARGUMENTS LACK MERIT

None of respondent's three alternative bases for denying qualified immunity (Br. 42-51) has merit.

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[5] That presumably is why this Court specifically reserved in ***Richardson*** qualified immunity's application to a private individual who serves as an adjunct to "an essential governmental activity," 521 U.S. at 413. Given ***Richardson***'s context, "essential" governmental activities is best understood as encompassing those discretionary functions conducted by the government itself in serving the public interest, *id.* at 408, rather than outsourced to the private sector. *Cf. Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545-546 (1985). The test thus enforces the rule that "'it is not a tort for the government to govern.'" *Scheuer*, 416 U.S. at 241 (quoting *Dalehite v. United States*, 346 U.S. 15, 57 (1953) (Jackson, J., dissenting)).

First, respondent argues (Br. 42-44) that petitioner should be consigned to a subjective "good faith" defense instead of qualified immunity. But this Court already recognized in *Harlow* that such a factual defense for juries to decide after trial offers insufficient protection for government from "insubstantial claims," 475 U.S. at 814-816.

Second, respondent asks (Br. 45-46) the Court to affix a "reasonable attorney" codicil to the qualified immunity defense. That is needless. This Court has already extended the standard qualified immunity rule to the activities of attorneys on numerous occasions, *see Buckley*, 509 U.S. at 268; *Burns*, 500 U.S. at 495, and respondent offers no reason why those who enacted Section 1983 would have expected a different rule here.

Third, respondent argues (Br. 46-51) that petitioner violated clearly established law. That argument is procedurally barred because it was not raised in respondent's brief in opposition to certiorari and thus is waived. S. Ct. Rule 15.2; *Granite Rock Co. v. International Bhd. of Teamsters*, 130 S. Ct. 2847, 2861 (2010). In addition, alternative grounds for affirmance must be "supported by the record," *Bennett v. Spear*, 520 U.S. 154, 166 (1997), but here the record forecloses the argument. The district court held, Pet. App. 48, and the court of appeals affirmed, *id.* at 21, that the order to respondent to produce claimed corroborating evidence did not violate clearly established constitutional law because this case "does not fit neatly into any previous category of Fourth Amendment law." Respondent did not seek this Court's review of the court's judgment dismissing the other individual defendants on that basis, and thus the judgment that the order did not violate clearly established law is a closed, final determination under principles of collateral estoppel. "[T]here is no sound reason for burdening the courts with repetitive litigation" of an issue that respondent already had a "full and fair opportunity to litigate" in this very case on these very facts and lost. *Standefer v. United States*, 447 U.S. 10, 24 (1980); *see, e.g.*, *Blonder-Tongue Labs., Inc. v. University of Illinois Found.*, 402 U.S. 313, 328-329 (1971) (defensive, non-mutual collateral estoppel applied).[6]

Indeed, respondent cites no case in which this Court has exercised its discretion to consider a (waived) alternative ground for affirmance when the relief sought would require an irreconcilable internal conflict in the judgment in the case. *See Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 364-365 (1994) (declining to address alternative ground because "the entire judgment would be undone," including "the issue on which [respondent] was a judgment loser").

The argument is also wrong on the merits. The order to respondent to produce the unopened insulation was only an "order" in that, if he did not verify his defense, the investigation into the potential misuse of sick leave would continue. The district court found, Pet. App. 48, and the court of appeals affirmed that failure to comply would not result in any "attendant threat to [respondent's] employment," *id.* at 23. The order thus lacked the coercive effect required by the Fourth and Fourteenth Amendments. *See Doe v. United States,* 487 U.S. 201, 214 n.13 (1988) (Fourth Amendment prevents "compelling" consent to a search). Instead, the directive during this internal affairs investigation was analogous to a demand that a party being deposed produce evidence corroborating his testimony, and was not materially different from the demand that he produce for inspection a doctor's note verifying his medical status, J.A. 160-163, 173; *cf. Donovan v. Lone Steer, Inc.,* 464 U.S. 408, 413-414 (1984) (an administrative subpoena requesting production of materials in a public place does not implicate the Fourth Amendment).

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[6] Law of the case likewise prevents a remand of the issue to the lower courts. *See In re Wiersma*, 483 F.3d 933, 941 (9th Cir. 2007).

Respondent, in short, seeks "general, special, exemplary and punitive damages" (J.A. 25) from a private attorney for a one-minute examination by government officials of corroborating evidence in an investigation (Pet. App. 48). But it would stand Section 1983 on its head to read its unwritten immunity principles as thwarting governmental access to the very legal advice needed to ensure compliance with the "rights, privileges, or immunities secured by the Constitution and laws[,]" 42 U.S.C. § 1983, particularly when it would be done by imposing full liability on a *private* individual for an order that he did not issue and a search he did not conduct, while all the *governmental* actors walk away immune.

By contrast, safeguarding the reasonable counsel provided by a temporarily retained attorney with the same qualified-immunity protection afforded to the government officials who seek, consult, receive, and act on that advice would significantly facilitate government's access to skilled legal services and promote "the proper and effective administration of public affairs," *Spalding v. Vilas*, 161 U.S. 483, 498 (1896).

CONCLUSION

For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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January 10, 2012

AMICUS
CURIAE
BRIEF

No. 10-1018

In the Supreme Court of the United States

STEVE A. FILARSKY, PETITIONER

v.

NICHOLAS B. DELIA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a private attorney retained by city officials to assist with a personnel investigation may assert qualified immunity when sued under 42 U.S.C. 1983 for a constitutional violation allegedly committed in the course of the investigation.

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INTEREST OF THE UNITED STATES

This case presents the question whether a private attorney retained by city officials to assist with a personnel investigation may assert qualified immunity when sued under 42 U.S.C. 1983 for a constitutional violation allegedly committed in the course of the investigation. The United States often hires private attorneys and other private parties to assist with the work of the federal government. Although those individuals generally are not subject to suit under 42 U.S.C. 1983 (because they do not act under color of state law), they may be subject to suit for damages for alleged constitutional violations under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and under state law. Qualified immunity has been found to be available in such actions under the same terms as in Section 1983 suits. *E g.*, *Wilson* v. *Layne*, 526 U.S. 603, 609 (1999); *Martin* v. *Malhoyt*, 830 F.2d 237, 252-253 (D.C. Cir. 1987) (Ginsburg, J.).[1]

The United States has an interest in ensuring that private contractors and volunteers acting on its behalf are able to serve the public good effectively and without undue fear of personal liability. At the same time, the United States has an interest in ensuring appropriate deterrence of, and remedies for, unconstitutional conduct by such private contractors and volunteers. The United States therefore has a substantial interest in the resolution of this case.

STATEMENT

1. Respondent is a firefighter for the City of Rialto in California. Pet. App. 3. In August and September 2006, he was on extended medical leave. *Id.* at 5-6. Respondent had recently been demoted, and was involved in a contentious labor dispute with the City. *Id.* at 43-44; J.A. 155. City officials, suspecting that respondent's claim of medical leave might be invalid, hired a private investigator to follow him while he was off work. Pet. App. 6, 44. The investigator filmed respondent buying

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[1] The Court is currently considering the question whether to imply a *Bivens* cause of action against individual employees of private companies under contract with the federal government to provide prison services. See *Minneci* v. *Pollard*, No. 10-1104 (argued Nov. 1, 2011). The United States has argued in that case that, primarily in light of the availability of alternative remedies, recognition of a *Bivens* action would be unnecessary and unwarranted. Insofar as a *Bivens* remedy against private parties acting on behalf of the federal government may be found to exist in certain contexts, the question whether, and to what extent, such parties could assert qualified immunity would assume particular significance.

building materials, including several rolls of fiberglass insulation, during his medical leave. *Ibid.*

City officials initiated an internal affairs investigation to determine if respondent had misused medical leave. Pet. App. 6, 44. The City retained petitioner to assist it with the investigation. *Id.* at 6-7. Petitioner is a private attorney—*i.e.*, "not an employee of the City"—with decades of experience in labor law. *Id.* at 24, 44-45; J.A. 156. Petitioner had worked with the City for 14 years, representing the City in labor litigation, arbitrations, and negotiations; conducting internal affairs investigations; and providing legal advice to city officials. Pet. App. 44-45, 88-89; J.A. 156.

As part of the investigation, city officials arranged to interview respondent. Pet. App. 44-45. Petitioner, respondent, an attorney for respondent, and two fire department Battalion Chiefs were present at the interview. *Id.* at 7, 45. During the interview, petitioner showed respondent the video of him purchasing fiberglass insulation and other building supplies. J.A. 120-123. Respondent said he had not installed the insulation and it was sitting in his kitchen. Pet. App. 7, 45; J.A. 106-108, 123-124. Petitioner consulted with the Fire Chief, and then informed respondent that if he showed city officials the unused insulation, the investigation would be over and he would be exonerated. Pet. App. 7-8, 46, 90-91; J.A. 143-145. Respondent, following the advice of his attorney, refused to do so. Pet. App. 8, 46; J.A. 131-132. Respondent's counsel told petitioner that he would have to procure a written order from the Fire Chief, and counsel further threatened to sue anyone involved in issuing such an order and seek damages against them in their personal capacities. J.A. 130-132, 134, 148.

Petitioner stopped the interview to consult with the Fire Chief and the City Attorney. Pet. App. 7-8, 46, 93. The Fire Chief then issued a written order requiring respondent to produce the insulation, and petitioner gave respondent the order. *Id.* at 46; see J.A. 160-161 (order).

The Battalion Chiefs, respondent, his attorney, and a union representative went to respondent's house. Pet. App. 8-9, 47. Petitioner did not accompany them. *Id.* at 8, 47-48. Respondent entered the house, retrieved three or four rolls of insulation, and placed them on the front lawn. *Id.* at 9, 47. The whole process lasted roughly one minute. *Id.* at 48. The Battalion Chiefs never left their vehicle, and after respondent brought out the insulation, they thanked respondent and drove away. *Id.* at 9, 47-48. City officials closed the internal investigation into respondent's use of medical leave and took no disciplinary action against him. *Id.* at 47-48.

2. Respondent sued the City, its fire department, the Fire Chief, the Battalion Chiefs, and petitioner for money damages under 42 U.S.C. 1983. Pet. App. 3. Respondent contended, *inter alia*, that the defendants had violated his Fourth Amendment rights by requiring him to produce the insulation for inspection. *Id.* at 3-4, 9; see J.A. 23-24 (complaint). The defendants moved for summary judgment, arguing that all individual defendants were entitled to qualified immunity and that there was no basis for imposing municipal liability on the City. See J.A. 182-183. Petitioner, in particular, conceded that he acted under color of state law and argued that he was entitled to qualified immunity on the same basis as the city officials even though he was a private attorney. Pet. App. 54-55, 71-76. Respondent opposed summary judgment on the ground that petitioner and the other indi-

vidual defendants all had violated clearly established law. Br. in Opp. App. 15-20.

The district court granted summary judgment to all defendants. Pet. App. 39-41, 48-49. In an oral ruling, the court explained that the individual defendants were protected by qualified immunity because their actions did not violate respondent's Fourth Amendment rights. J.A. 182-183. The court also concluded that municipal liability was inappropriate because none of the individual defendants had final policymaking authority and there was no pertinent municipal practice or custom. J.A. 182; see *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658 (1978). The court memorialized its oral ruling in a written order. Pet. App. 48-49.

3. The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 1-38. The court first decided that respondent's Fourth Amendment rights were violated when he "was compelled to enter his own home and retrieve the insulation for public view by order of [the Fire] Chief." *Id.* at 19-20 (emphasis omitted). The court determined, however, that respondent's right to be free from such actions was not clearly established. The court explained that no prior decision "would have put defendants on notice that [the Fire Chief's] order to [respondent], with no attendant threat to his employment, constituted a violation of the Fourth Amendment." *Id.* at 21-24. The court therefore granted qualified immunity to the Fire Chief and Battalion Chiefs. *Id.* at 24.

The court declined to grant qualified immunity to petitioner, however. Pet. App. 24-27. In *Gonzalez* v. *Spencer*, 336 F.3d 832 (9th Cir.) (per curiam), cert. denied, 540 U.S. 940 (2003), the court had held that a private attorney hired to represent a county juvenile court in a lawsuit could not invoke qualified immunity because she was "a private party, not a government employee," and she "pointed to 'no special reasons significantly favoring an extension of governmental immunity' to private parties in her position." *Id.* at 835 (quoting ***Richardson*** v. ***McKnight***, 521 U.S. 399, 412 (1997)). Relying on *Gonzalez*, the court in this case stated that, because petitioner "is not an employee of the City" but is "a private attorney * * * retained by the City to participate in internal affairs investigations," he could not invoke qualified immunity. Pet. App. 24, 27. In light of the court's grant of qualified immunity to the government officers and its denial of qualified immunity to petitioner, petitioner alone faced liability for the order issued by the Fire Chief.[2]

SUMMARY OF ARGUMENT

Although 42 U.S.C. 1983 principally regulates the conduct of government officials, a private person may be liable if he acts "under color of" state law. When a private person is treated as a state actor for purposes of Section 1983 liability, it raises the question whether the individual can invoke the principles of qualified immunity that would apply if he were a government official. Here, petitioner is entitled to assert qualified immunity because he worked directly alongside and under the supervision of public officials in the performance of a government function, and because recognition of immunity in the circumstances would be consistent with historical tradition.

A. This Court's decisions reject an all-or-nothing answer to the question whether a private party acting under color of state law is entitled to invoke qualified immunity when sued under Section 1983. *Richardson* v. *McKnight*, 521 U.S. 399 (1997); *Wyatt* v. *Cole*, 504 U.S. 158 (1992). While the Court has declined to hold that a private party may assert qualified immunity whenever his conduct amounts to state action subject to liability under Section 1983, the Court has also declined to impose any categorical bar against the assertion of qualified immunity by a private party. Whether a person can invoke qualified immunity depends not merely on his status as a private person or a government employee, but instead turns on the nature of the functions the person performs and whether affording qualified immunity would further the doctrine's underlying purposes and be consistent with historical tradition.

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[2] The court of appeals agreed with the district court's rejection of municipal liability against the City. Pet. App. 27-37.

B. A private person acting under color of state law should be entitled to assert qualified immunity when sued for acts taken (1) in service of the public interest as opposed to his own private interests, and (2) while working directly alongside government officials or under close governmental supervision. Although performance of a public function does not itself invariably suffice to justify invoking qualified immunity, recognition of immunity is appropriate when a person both acts in the public interest and does so as an "adjunct to government" or "under close official supervision." *Richardson*, 521 U.S. at 413. Government employees and private persons often work side-by-side in performing important government functions, and when they are sued for constitutional violations committed as state actors, the private person should not be the only party left to face individual liability for money damages. Recognizing immunity in those circumstances would promote the doctrine's core purposes—*viz.*, to prevent unduly timid and cautious performance of government functions based on fear of personal liability; to avoid deterring capable persons from participating in the performance of public functions; and to limit the distraction of individuals engaged in those functions.

The circumstances of this case are illustrative. Petitioner was retained to assist in the City's investigation of one of its employees and to provide legal advice in the course of the investigation. He worked closely with fire department officials throughout the process and did so under their direct supervision. Denying him qualified immunity not only would tend to encourage unwarranted timidity in the performance of public duties by persons in petitioner's shoes, but it would also directly (and adversely) affect the conduct of official duties by public officials working in close coordination: any effect on the quality of petitioner's legal advice would necessarily affect the decisions of the public officials who rely on that advice. Moreover, if a private attorney who advises a city government can be held personally liable for providing reasonable but mistaken legal advice, such attorneys may be unwilling to take on government clients. At the least, the potential costs of constitutional torts suits will be passed on from attorneys to government clients, and ultimately, to taxpayers. Finally, denying liability not only would distract the private individual engaged in performance of public duties by requiring him to defend against a lawsuit, but it also would distract public officials alongside whom he works insofar as they, too, may be called upon to participate in the litigation as deponents, fact witnesses, and the like.

For those reasons, affording qualified immunity in the circumstances of this case would promote the ability of government to perform its traditional and important functions. Denying immunity, however, would have the anomalous consequence of leaving a private person as the sole party to face personal liability under a statute chiefly aimed to address unconstitutional action by government officials.

C. Nothing in the historical tradition that informs the availability of qualified immunity counsels against recognizing immunity in the circumstances of this case. To the contrary, there is substantial historical support for affording immunity to a private attorney advising a city government. As this Court has recognized, the common law "provide[d] a kind of immunity for * * * lawyers who performed services at the behest of the sovereign." *Richardson*, 521 U.S. at 407. Nineteenth-century governments relied heavily on private attorneys, both to provide legal advice to government agencies and to serve as government adjuncts in the capacity of a private prosecutor. Lawyers, both public and private, enjoyed a form of immunity for their reasonable, good-faith judgments. Denying petitioner immunity here would stand in tension with that historical tradition.

ARGUMENT

A PRIVATE ATTORNEY RETAINED TO WORK WITH GOVERNMENT OFFICIALS IN THE PERFORMANCE OF A PUBLIC FUNCTION MAY ASSERT QUALIFIED IMMUNITY IN A CONSTITUTIONAL TORT LAWSUIT

Under 42 U.S.C. 1983, a plaintiff may seek damages from a person acting "under color of" a state "statute, ordinance, regulation, custom, or usage" who violates his federal constitutional or statutory rights. Section 1983 aims to deter state actors from "using the badge of their authority to deprive individuals of their federally guaranteed rights" and to "provide relief to victims if such deterrence fails." *Wyatt* v. *Cole*, 504 U.S. 158, 161 (1992). Section 1983 applies not only to government officials, *Monroe* v. *Pape*, 365 U.S. 167, 175-177 (1961), but also to private parties acting under color of state law, *Lugar* v. *Edmonson Oil Co.*, 457 U.S. 922, 924 (1982).

Although Section 1983 "admits of no immunities" on its face, *Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976), this Court has recognized the availability of qualified immunity in circumstances in which the "tradition of immunity was so firmly rooted in the common law" and "was supported by such strong policy reasons" that Congress would have expected the recognition of immunity. *Owen* v. *City of Independence*, 445 U.S. 622, 637 (1980). Qualified immunity shields individuals acting under color of law from suit unless their actions "violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Hope* v. *Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)). The doctrine is designed to ensure "that fear of liability will not unduly inhibit officials in the discharge of their duties," *Camreta* v. *Greene*, 131 S. Ct. 2020, 2030-2031 (2011) (internal quotation marks omitted), and to avoid unduly deterring capable individuals from participating in public service or distracting them from the performance of their responsibilities, *Mitchell* v. *Forsyth*, 472 U.S. 511, 525-526 (1985). Qualified immunity furthers those objectives by affording "both a defense to liability and limited entitlement not to stand trial or face the other burdens of litigation." *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1945-1946 (2009) (internal quotation marks omitted).

The considerations underlying the doctrine of qualified immunity fully support its application in the circumstances of this case. Petitioner, a private attorney with decades of labor-law experience, was retained by a city to work alongside and under the direction of city officials in conducting a personnel investigation. All of the individual government defendants involved in the investigation were granted qualified immunity. The issue in this case is whether petitioner alone should be denied qualified immunity merely because he is a private attorney rather than a city employee, even though he performed public functions while acting in direct concert with city officials. The answer is no. Recognizing qualified immunity here would substantially advance the purposes of the doctrine and cohere with historical tradition. Consequently, there is no justification for leaving a *private party*—to the exclusion of all government officers—to bear sole responsibility under a statute that affords redress for unlawful *state* action.

A. This Court's Decisions Support The Assertion Of Qualified Immunity By Private Persons Acting Under Color Of State Law When It Would Advance The Underlying Purposes Of Immunity And Reflect Historical Tradition

The Court has previously considered the circumstances in which private persons sued under 42 U.S.C. 1983 may invoke qualified immunity. The Court has approached that question just as it does for public officials, by examining the nature of the defendant's activities, the purposes of the qualified immunity doctrine, and the historical support for affording immunity in the circumstances.

1. In *Wyatt* v. *Cole*, 504 U.S. 158 (1992), a private party invoked state replevin law to obtain an order to seize his former business partner's property without a hearing. *Id.* at 159-160. The Court considered whether the individual who obtained the seizure order and his

lawyer could invoke qualified immunity in a Section 1983 suit. *Ibid.* The Court assumed that the defendants had acted under color of state law, and assessed their claim to qualified immunity in light of the nature of their activities, whether they would historically have been provided any protection for them, and whether affording qualified immunity would serve the doctrine's purposes. The Court decided that the defendants could not assert qualified immunity. *Id.* at 164-167.

The Court initially observed that, at common law, individuals sued for malicious prosecution and abuse of process did not possess immunity from suit. *Wyatt*, 504 U.S. at 164-165. The Court then turned to the policies served by qualified immunity. The Court concluded that "the special policy concerns" supporting the application of qualified immunity to government officers did not apply to a private person who invoked state replevin law to settle a private dispute. *Id.* at 166-167. Those policy concerns, the Court explained, were to prevent undue timidity in the performance of discretionary action by public officers; to avoid discouraging persons from entering public service; and to limit distracting individuals from their public duties. *Id.* at 167-168. The Court contrasted the private individuals at issue, whose challenged actions were taken in furtherance of their own private financial interests, with individuals like "school board members" or "police officers," who "hold [an] office requiring them to exercise discretion" and are "principally concerned with enhancing the public good." *Id.* at 168. Those individuals, the Court explained, likely should be afforded qualified immunity to encourage them to perform public service and "to act forcefully and decisively" when doing so. *Ibid.*

2. Subsequently, in *Richardson* v. *McKnight*, 521 U.S. 399 (1997), the Court considered whether private prison guards could assert qualified immunity in a Section 1983 action brought by an inmate. The guards were employed by a private, for-profit corporation that was under contract with the State to manage and operate a prison. *Id.* at 409. The Court explained that, as in *Wyatt*, the entitlement of the private prison guards to qualified immunity would turn on "history and * * * the purposes that underlie government employee immunity." *Id.* at 404. With regard to history, the Court observed that there was no "firmly rooted tradition of immunity applicable to privately employed prison guards." *Ibid.* (internal quotation marks omitted). With regard to the purposes of qualified immunity, the Court considered it a "closer question" whether those purposes "warrant immunity for private prison guards" in the circumstances. *Id.* at 407.

The Court concluded that the purposes of qualified immunity would not adequately be served by recognizing immunity. In the Court's view, the "most important" such purpose—preventing "unwarranted timidity" in the performance of public responsibilities—is of diminished concern "when a private company subject to competitive market pressures operates a prison." *Richardson*, 521 U.S. at 409. That is because a private "firm whose guards are too timid will face threats of replacement by other firms," *ibid.*, and also may take action against under-performing individuals without the constraints imposed by civil-service rules, *id.* at 410-411. The same flexibility, the Court reasoned, enables a private firm to offer increased pay or benefits to "potential applicants" as a means of counteracting "the employment-discouraging fear of unwarranted liability." *Id.* at 411. And while ongoing lawsuits might distract private prison guards from their duties, the Court viewed the risk of distraction alone to afford insufficient grounds for immunity. *Ibid.*

Significantly, however, the Court stressed that its decision was a "narrow[]" one confined to "the context in which it arose"—that of a "private firm, systematically organized to assume a major lengthy administrative task * * * with limited direct supervision by the government." *Richardson*, 521 U.S. at 413. The Court indicated that the case would be different if it involved a "private individual briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision." *Ibid.*

3. The Court's decisions thus establish that "§ 1983 immunity does not automatically follow § 1983 liability." *Richardson*, 521 U.S. at 412. The decisions equally establish, however, that private persons acting under color of state law are not categorically ineligible for qualified immunity. The court of appeals therefore erred at the outset in finding petitioner ineligible for qualified immunity based solely on his status as a "private attorney" rather than "an employee of the City." Pet. App. 24.

Rather than hinge the availability of qualified immunity solely on a person's status as a government employee or private person, this Court assesses the justification for immunity in light of the policy and historical concerns supporting the grant of immunity to government officials. *Richardson*, 521 U.S. at 404-412; *Wyatt*, 504 U.S. at 167. With respect to the policy concerns underlying qualified immunity, the Court considers whether the individual's challenged actions are "principally concerned with enhancing the public good" and whether recognition of immunity would "protect[] government's ability to perform its traditional functions." *Wyatt*, 504 U.S. at 167-168. With respect to history, the Court examines whether there is a "tradition of immunity" in comparable circumstances. *Id.* at 164, 167-168; see *Richardson*, 521 U.S. at 403-404.

Although those considerations led the Court to deny qualified immunity to the private defendants in *Richardson* and *Wyatt*, the Court carefully and expressly limited its holdings to the specific contexts it confronted. *Richardson*, 521 U.S. at 413; *Wyatt*, 504 U.S. at 168-169. Of particular significance, the Court suggested that private persons retained to work closely with government officials in furtherance of the public interest would present a different case. *Richardson*, 521 U.S. at 409, 413; *Wyatt*, 504 U.S. at 167-168. Those are precisely the circumstances at issue here.

B. Applying Qualified Immunity To A Private Party Retained To Further The Public Interest Under Supervision Of Government Officials Would Directly Promote The Doctrine's Core Purposes

Qualified immunity generally should be available to a private party acting under color of state law when the party (1) has been retained by government to assist in serving public interests, and (2) works alongside or under close supervision of government officials. Affording immunity in those circumstances, as this case illustrates, directly promotes the same policy considerations that animate the doctrine's application to public officials.

1. *Granting qualified immunity to private parties retained to serve public interests while acting in concert with public officials promotes the effective performance of government functions*

Once a private party is deemed to be acting under color of state law and hence subject to suit under Section 1983, qualified immunity generally should be available if he is retained to work in furtherance of the public interest and does so alongside or under close supervision of government officials.

a. As an initial matter, the nature of the function performed by the person is significant because the overarching purpose of qualified immunity is to "protect[] government's ability to perform its traditional functions." *Wyatt*, 504 U.S. at 167. Accordingly, the Court has distinguished between those persons who take on government work in service of the public good and those, as in *Wyatt*, who invoke state law to further their own personal, financial interests. *Id.* at 167-168. Qualified immunity "acts to safeguard government, and thereby to protect the public at large, not to benefit its agents." *Id.* at 168.

Qualified immunity therefore does not apply to a private person who acts under color of state law in the context of a private business dispute. *Wyatt*, 504 U.S. at 167-168. By contrast, the Court has granted qualified immunity to persons serving the public interest as school board members, recognizing that, without protection from individual damages actions, even the "most conscientious" person would be deterred from "exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students." *Wood* v. *Strickland*, 420 U.S. 308, 319-320 & n.11 (1975).

b. The Court has explained the "mere performance of a governmental function" does not itself invariably suffice to warrant the application of qualified immunity. *Richardson*, 521 U.S. at 408. But while performance of a government function may not be enough, by itself, to justify qualified immunity, there is a sound basis for extending qualified immunity to a private party who performs a public function alongside or under supervision of government officials. Indeed, in stating that performance of a public function would not itself necessarily justify qualified immunity, the Court observed that that was "especially" the case "for a private person who performs a job without government supervision or direction." *Id.* at 408-409. And the Court went on to emphasize that it was not addressing a private individual "serving as an adjunct to government in an essential governmental activity, or acting under close official supervision." *Id.* at 413. Those circumstances squarely implicate the core policies underlying qualified immunity and support application of the doctrine.

i. The Court has explained that the "most important" policy concern supporting qualified immunity is the interest in avoiding any "unwarranted timidity" in the performance of public functions that may stem from a fear of personal liability. *Richardson*, 521 U.S. at 409-410. In denying qualified immunity in *Richardson*, the Court believed that employees of private companies under long-term contract with the government (such as contracts to operate a prison) are more likely motivated by "competitive market pressures" than concerns about individual liability. *Ibid.* By contrast, when a private individual is retained to work in close coordination with government officials, concerns about indecisive and overly timid performance of public functions become acute.

In part, that is because the private party himself may exercise undue caution in the performance of his own responsibilities in light of the prospect of liability. Of particular significance, moreover, when a private party is retained to work alongside and under the supervision of government officials, the denial of qualified immunity not only may tend to produce unduly cautious decisions and actions on the individual's own part, but such timidity in turn would necessarily affect the *public officials* with whom the individual works in close coordination. For instance, if the fear of liability would lead a private party to err on the side of caution in giving advice to, and forming recommendations for, his public supervisors, those public officials would carry out their responsibilities on the basis of deficient (and unduly risk averse) recommendations and advice. Even though they, as public officials, could assert qualified immunity, any inability to invoke immunity by the private individual on whom they rely would adversely affect their performance of their public duties. For that reason, circumstances in which a private party works as part of an integrated team with public officials markedly differ from the circumstances in *Richardson*, and afford a materially stronger foundation for enabling the private party to invoke qualified immunity.

ii. In addition to the concern with encouraging non-timid and decisive action in the public interest, qualified immunity also rests on a concern that the prospect of damages liability would unduly deter individuals from entering public service in the first place. *E.g.*, *Richardson*, 521 U.S. at 411; *Mitchell*, 472 U.S. at 526. That concern is magnified in circumstances in which private persons are retained to work closely with government officials. They will invariably be required to make the same kinds of difficult judgments, and carry out the same kinds of functions, as their colleagues who are government employees. Such individuals would be less willing to "enter[] public service" and "serve the public good" if they were denied the immunity afforded government employees with whom they work directly and closely. *Wyatt*, 504 U.S. at 167. That is particularly so because, whereas a private prison guard working for a large company operating a prison would face the same prospect of liability as his fellow private employees, a private person retained to work as part of a team composed primarily of public officials would alone face a prospect of liability not shared with any of his fellow workers.

If private individuals were to be deterred from undertaking to perform public functions in such circumstances due to fear of individual liability, the overarching objective of promoting the effective functioning of government would be substantially disserved. A government entity may elect to retain a private party to assist in the performance of public duties for a variety of reasons. Those include, for instance, the availability of particular expertise in the relevant area, or the absence of an adequate long-term need for a given service to warrant creation of a permanent, full-time position.

For instance, the Federal Bureau of Investigation retains technical specialists, such as experts in wiretapping or surveillance, on a contract basis to assist in its law enforcement efforts. Such individuals serve "as an adjunct to government in an essential government activity." *Richardson*, 521 U.S. at 413. Similarly, the federal government hires contractors who work directly for federal personnel as courthouse security guards. Such officers, although not public employees, play an important role in protecting public buildings and are subject to the oversight of government officials. Private citizens may also cooperate voluntarily in the performance of government functions at the request and under the direction of public officials. For example, federal law enforcement agencies may enlist private citizens or corporate entities to serve as informants in criminal cases and to provide "backstopping" for undercover operations, *i.e.*, to vouch for fictitious business enterprises used in a law enforcement sting. Private parties have been sued when offering that type of assistance to the federal government. See, *e.g.*, *Brown* v. *NationsBank Corp.*, 188 F.3d 579 (5th Cir. 1999) (backstopping), cert. denied, 530 U.S. 1274 (2000); *Unus* v. *Kane*, 565 F.3d 103 (4th Cir. 2009), cert. denied, 130 S. Ct. 1137 (2010) (informant).

Insofar as private persons in such situations may be subject to liability for constitutional torts, granting them qualified immunity would encourage them to work with government officials in these and other ways. And because private parties would generally be subject to close government supervision in such circumstances, there should be no greater likelihood of constitutional deprivations than is the case with government employees subject to the same supervision in the performance of their duties. Denying qualified immunity, however, would substantially constrain the government's ability to carry out its functions. By discouraging private parties from agreeing to assist the government in the performance of its duties, the denial of immunity would tend to deprive the government of an important tool by which to carry out its functions. At the least, the absence of immunity—and the corresponding prospect of personal liability—would predictably increase the costs to government of retaining private parties to assist with the conduct of government functions.

iii. Qualified immunity also aims to minimize the extent to which lawsuits distract officials from their governmental duties. See *Richardson*, 521 U.S. at 408, 411-412; *Wyatt*, 504 U.S. at 167; *Mitchell*, 472 U.S. at 526. This Court in *Richardson* understood that, even in the context of private prison guards employed by a company operating a prison under contract, the denial of immunity would distract the guards from the performance of their duties. 521 U.S. at 411-412. The Court determined, however, that because the remaining policy concerns favoring immunity were diminished in the circumstances, the interest in avoiding distraction did not alone supply adequate grounds for granting qualified immunity. But when private persons are retained to perform public functions in close coordination with government officials, the circumstances not only implicate policy concerns apart from the interest in avoiding undue distraction, see pp. 16-21, *supra*, but even that concern alone is substantially enhanced.

That is because public officials in that situation, although entitled to assert qualified immunity against any action filed against them, would be distracted from the performance of their responsibilities in connection with any lawsuit initiated against their private-party colleague. Because the private party's challenged conduct would arise in the context of close coordination with (and supervision by) government officials, those officials would frequently need to participate in the litigation as witnesses, deponents, and the like, including to shed light on the nature of the private defendant's conduct and elaborate on the particular facts in issue.

The interest in avoiding distraction, like the remaining policy concerns animating the application of qualified immunity to government officials, thus strongly supports the application of immunity when a private person is retained to assist in the performance of public functions alongside or under the supervision of public officials. Conversely, it would be highly anomalous in those circumstances to deny qualified immunity to the private party alone, leaving a private individual with sole liability for violation of rights under color of state law. See *Wyatt*, 504 U.S. at 180 (Rehnquist, C.J., dissenting) ("Our § 1983 jurisprudence has gone very far afield indeed, when it subjects private parties to greater risk than their public counterparts, despite the fact that § 1983's historic purpose was to prevent *state officials* from using the cloak of their authority under state law to violate rights protected against state infringement.") (internal quotation marks omitted).

2. The facts of this case illustrate the basis for qualified immunity when private persons are retained to perform government functions alongside public officials

Because petitioner was engaged to assist with performance of a core public function and to do so under the close supervision of public officials, the policy considerations underlying qualified immunity are fully applicable here. He alone should not be saddled with personal liability while all of the involved city officials gain the protection of qualified immunity.

a. Petitioner indisputably was retained to assist in the performance of a core public function. A governmental entity might retain a private attorney like petitioner because there is a temporary need for assistance with an unusually demanding case; a need for specialized expertise in a particular area of the law; a need to avoid actual or potential conflicts-of-interest; or a need for an independent opinion by an outsider.[3]

Here, petitioner was engaged to assist with and provide advice on an internal personnel investigation for a city fire department, performing the same type of work a government official might perform. In particular, he bore responsibility for conducting portions of the investigation and providing legal analysis and advice about how to resolve the investigation. Pet. App. 44-45, 59. All parties agreed that petitioner could be sued for these acts under Section 1983 because he was "clothed with the authority of" the City. *United States* v. *Classic*, 313 U.S. 299, 326 (1941); see J.A. 21; Pet. 3. Indeed, when respondent initiated this lawsuit, he apparently believed that petitioner *was* a city employee. See J.A. 21 (complaint alleges that petitioner "was at all times relevant, an employee of the City of Rialto charged with conducting internal investigations," and that he "acted under color of state law, within the course and scope of his employment").

Respondent's initial belief evinces a recognition that petitioner performed a quintessential government function—a governmental investigation of the government's own employee—in service of the public interest. Petitioner more closely resembles a school board member, who is "principally concerned with enhancing the public good," than an individual acting under color of law to resolve a private business dispute. See *Wyatt*,

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[3] See, *e.g.*, William V. Luneburg, *Contracting by the Federal Government for Legal Services: A Legal and Empirical Analysis*, 63 Notre Dame L. Rev. 399, 463 (1988); United States General Accounting Office, *Private Attorneys: Information on the Federal Government's Use of Private Attorneys*, GAO/GGD-93-17FS, at 1 (1992).

504 U.S. at 168. Indeed, an attorney hired by a local government is obligated by applicable professional standards to act in her client's—*i.e.*, the public's—interest rather than her own interest. See, *e.g.*, American Bar Ass'n, Model R. of Prof'l Conduct 1.2, 1.7, 1.8.

b. Petitioner worked side-by-side with government officials during the personnel investigation, and at all times operated under the close supervision of city officials. When petitioner interviewed respondent, two fire department Battalion Chiefs were present in the room and the Fire Chief was close by. Pet. App. 7-8. As the interview progressed, petitioner consulted with the Fire Chief and the City Attorney. *Id.* at 7-8, 46. Petitioner suggested that the investigation could be resolved favorably to respondent by having him produce the unused building materials for inspection, but he did not (and could not) order respondent to do so—rather, the Fire Chief did. *Id.* at 46-47. In short, unlike the private prison guards in ***Richardson***, who were employees of "a private firm, systematically organized to assume a major lengthy administrative task * * * with limited direct supervision by the government," petitioner was "associated with a government body, serving as an adjunct to government in an essential governmental activity" and was "acting under close official supervision." 521 U.S. at 413.

Affording qualified immunity to petitioner advances the important policies animating the doctrine. *First*, the circumstances directly implicate the interest in avoiding undue caution in the exercise of public functions. If an attorney can be personally liable for her reasonable but mistaken legal advice to a city government, even the most experienced and talented attorney may hesitate before offering her client advice on unsettled legal issues. See *Harlow*, 457 U.S. at 814 ("[F]ear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.") (internal quotation marks omitted). In this very case, respondent's counsel threatened petitioner with a lawsuit while petitioner was in the midst of advising city officials about how to proceed with the personnel investigation. See p. 3, *supra*; J.A. 130-132, 134, 148. Without qualified immunity, a private attorney's fear of personal financial liability for reasonable (but ultimately erroneous) legal advice could compromise her ability to fulfill her professional obligation to provide candid and robust advice to her client about the government's legal options.

Any undue caution on counsel's part not only would adversely affect the content of her advice to her public colleagues and supervisors, but would necessarily in turn adversely affect their performance of their own responsibilities. Here, for instance, petitioner gave advice to, and consulted with, his clients in the fire department throughout the course of the investigation. While the fire department officials could invoke qualified immunity in any suit against them, their decisions concerning the conduct of their duties would nonetheless be compromised by any unduly cautious legal advice they might receive from petitioner. The denial of immunity to petitioner thus would predictably affect not only his own conduct of public duties, but also the conduct of those duties by the public officials with whom he works.

Second, denial of immunity would tend to discourage private attorneys like petitioner from taking on representation of government clients in the first place. Unlike a for-profit prison-management firm of the kind at issue in *Richardson*, which serves only governmental entities, private attorneys may work for a wide variety of clients, both public and private, and they generally may choose their clients. Many attorneys may agree to take on representation of governments as a matter of public service, often at below-market rates. But if representing a government client entails the potential of constitutional tort liability when the attorney's judgment call turns out to be wrong, attorneys will be less willing to participate in the performance of public functions. Here, for instance, petitioner served the City for over a decade by providing advice and representation on labor-law matters. In return, he not only was sued as a state actor, but he is the only defendant left litigating this case and the only one facing the prospect of personal liability.

Further, the threat of personal liability will require those attorneys who take on government work to pass on the potential costs to the government entities who retain them. There is no "free lunch," because "as civil-rights claims increase, the cost of civil-rights insurance increases." *Richardson*, 521 U.S. at 419 n.3 (Scalia, J., dissenting). And insofar as attorneys are unable to obtain malpractice insurance that covers constitutional torts claims, see Pet. Br. 50-51, they would be still less likely to take on government clients without some guarantee of indemnification from those clients.

Third, and finally, denying qualified immunity to private attorneys in petitioner's position would distract both the attorneys and their government-employee counterparts from their official duties. Qualified immunity is immunity not only from damages, but from suit. See, *e.g.*, *Harlow*, 457 U.S. at 814. If that protection is unavailable to private attorneys working for public clients, those attorneys could be forced to forgo substantial portions of their practice while defending against constitutional torts suits. As explained, this distraction will inevitably spread to government employees as well; they may, for example, be deposed or required to testify in Section 1983 cases—even where they themselves have already been afforded qualified immunity—because a claim remains against a private attorney who lacks immunity.

C. Applying Qualified Immunity In The Circumstances Of This Case Is Consistent With Historical Tradition

When determining whether to enable private parties acting under color of law to claim qualified immunity, this Court assesses both whether the purposes of the doctrine would support recognition of immunity and whether historical tradition would do so. See *Richardson*, 521 U.S. at 404-412; *Wyatt*, 504 U.S. at 163-169. Here, the purposes of qualified immunity support its recognition in the circumstances of this case. In addition, there is substantial historical support for affording qualified immunity to individuals retained to assist with the day-to-day workings of local governments, particularly those who serve the public interest as attorneys.

1. At the time Section 1983 was enacted, private actors routinely participated in important functions of local governments. "From the perspective of American history, public-private governance is distinctly old rather than surprisingly new." William J. Novak, *Public-Private Governance: A Historical Introduction*, in *Government by Contract: Outsourcing and American Democracy* 23, 39 (2009) (Novak). Since the time of the Founding, local governments in the United States operated with substantial assistance from private individuals. The early institutions for governing the American

colonies were based on "early traditions of English legal rule," where the various institutions of local governance relied on charters and bylaws that had "not an absolute demarcation of institutions of public authority, but rather a strange mélange of private, public, and associative functions." *Id.* at 27. The same was true in the American colonies, which substantially relied on the efforts of private citizens for local governance. *Id.* at 28-29; see also, *e.g.*, 1 *Encyclopedia of the North American Colonies* 305-312, 348-360 (1993). In the eighteenth and nineteenth centuries, there was a "mixture of public and private means and ends in the administration of policies concerning such things as crime, health, education, and welfare." Novak 31.

There is a significant history of private attorneys, in particular, providing assistance with local government functions. "Up until the late nineteenth century, when the office of the public prosecutor developed, private lawyers regularly prosecuted criminal cases on behalf of both crime victims and the state. Even well into the twentieth century, many prosecutors (even federal prosecutors) had a hybrid existence, maintaining private practices while prosecuting criminal matters for the government." Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. Davis L. Rev. 411, 413 (2009); see Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 Am. J. Legal Hist. 43, 43 (1995) ("[P]rivately funded prosecutors constituted a significant element of the state criminal justice system throughout the nineteenth century."); Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. Rev. 53, 110 (2005) (Johns) ("Throughout the nineteenth century, private prosecution flourished in most states."). Indeed, "there generally was no such thing as the modern public prosecutor" in 1871. *Kalina* v. *Fletcher*, 522 U.S. 118, 132 (1997) (Scalia, J., concurring); see *id.* at 124 n.11. Local governments relied on private attorneys to serve as public prosecutors both because of the tradition of such prosecutions in England, but also because of the practical needs to "stretch[] capacity, spread[] costs, and lessen[] the need for an expansive, professional bureaucracy." Novak 31; see Johns 108-109.

Private attorneys served nineteenth-century governments in other roles as well. Before the creation of the Department of Justice in 1870, federal agencies often relied on private attorneys to provide their legal counsel. See Homer Cummings & Carl McFarland, *Federal Justice: Chapters in the History of Justice and the Federal Executive* 218-229 (1937). Private attorneys could serve as federal judges while maintaining their own private law practices. See, *e.g.*, James E. Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 Mich. L. Rev. 1, 23 (2008). Many individual attorneys took on representation of government clients in high-profile cases in addition to their private clients. See Pet. Br. 18-20 (providing examples).

2. At common law, constitutional torts were not recognized as such. But the common law "provide[d] a kind of immunity" for private attorneys who "performed services at the behest of the sovereign," *Richardson*, 521 U.S. at 407, and that immunity provides a historical foundation for affording qualified immunity to attorneys such as petitioner in Section 1983 suits. For some activities, private attorneys could claim an absolute "judicial" immunity, which "protected judges, jurors and grand

jurors, members of courts-martial, private arbitrators, and various assessors and commissioners" who "were charged with resolving disputes between other parties or authoritatively adjudicating private rights." *Kalina*, 528 U.S. at 132 (Scalia, J., concurring).

For other conduct, private attorneys could rely on the defenses of good faith and reasonable cause. At common law, attorneys were ordinarily liable to third parties only for intentional misconduct, when they acted maliciously and without cause. See Joel P. Bishop, *Commentaries on the Non-Contract Law* § 704, at 325 (1889) (cited in *Richardson*, 521 U.S. at 407); see also 3 William Blackstone, *Commentaries on the Laws of England* 126-127 (1768); Edward P. Weeks, *A Treatise on Attorneys and Counselors at Law* § 127, at 267-269 (2d ed. 1892) (Weeks). Both public and private attorneys were able to invoke the defenses of good faith and probable cause. Weeks § 127, at 269; see, *e.g.*, *Tower* v. *Glover*, 467 U.S. 914, 921 (1984) (acknowledging that public lawyers at common law enjoyed immunity from liability for non-intentional conduct). This type of "quasi-judicial immunity" would protect "public officials ma[king] discretionary policy decisions that did not involve actual adjudication" and therefore is "akin to what we now call 'qualified,' rather than absolute, immunity." *Kalina*, 528 U.S. at 132 (Scalia, J., concurring).[4]

There is, accordingly, substantial historical support for petitioner's claim to qualified immunity here. Petitioner was undertaking an official investigation on behalf of a local government, similar to the actions taken by a police officer or a public prosecutor. Had he been sued by the target of such an investigation in 1871 for malicious prosecution, he would have prevailed in the lawsuit because his legal judgment about how to resolve the investigation was a reasonable one. See Weeks § 127, at 269 ("[A]n attorney is not liable, civilly, for ordering a levy on property, if he acts in good faith and on reasonable cause. To sustain an action against an attorney for acts done in the prosecution of his client's rights, it must be shown that such acts were malicious, and without foundation."). That is especially true because petitioner was at all times supervised by, and was carrying out the orders of, city officials. See, *e.g.*, *Ford* v. *Williams*, 13 N.Y. (3 Kern.) 577, 584-585 (1856) (attorney who executed a seizure of property was not liable for trespass because he "act[ed] only in the execution of the duties of his calling or profession, and does not go beyond it, and does not actually participate in the trespass, he is not liable"; the attorney is "shield[ed]" for "simply convey[ing] to the officer the instructions of his clients"). The historical treatment of attorneys serving the public interest fortifies the conclusion that petitioner should be afforded qualified immunity, so that he is not left as the only person in this case facing personal liability.

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[4] While this common law immunity was immunity from damages rather than immunity from suit, pre-trial discovery in the nineteenth century was not as burdensome as it is today. See Michael E. Wolfson, *Addressing the Adversarial Dilemma of Civil Discovery*, 36 Clev. St. L. Rev. 17, 25-27 (1988).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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STEVE A. FILARSKY,
Petitioner,

v.

NICHOLAS B. DELIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENT

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task. This is a special immunity from § 1983 that Congress has not authorized, that the common law did not recognize, that does not serve the policy aims of qualified immunity for government employees, and that would undermine Americans' constitutional rights as well as their right of access to the courts.

Qualified immunity was created by this Court to reflect historical practice and to further policy interests. Its scope should be drawn no wider than is required by those bases.

In 1871, Congress found it necessary to create the cause of action for damages in 42 U.S.C. § 1983 to enforce the constitutional rights guaranteed to all Americans. Congress made no provision for exemptions or immunities. Nevertheless, this Court has presumed that Congress was aware of the defenses and immunities that were well-established at common law and would have intended to recognize those immunities that serve important public policies. This Court has recognized, for example, the absolute immunity for judges. The Court has also held that officials performing discretionary functions are shielded from liability under § 1983 for conduct that does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. To extend that immunity to attorneys who are not governmental officials or employees would exceed the intent of Congress.

The scope of qualified immunity should also be narrowly construed because it limits the remedial cause of action Congress established to enforce federal constitutional rights. Congress was aware that an award of damages is often the only effective means of enforcing those rights and specifically intended that this remedy be expansively construed and broadly available. This Court is not free to expand qualified immunity in violation of that intent, even if persuaded by sound policy reasons.

Finally, the scope of qualified immunity ought to be narrowly construed because it is not simply a limitation on the elements of the wrong. It is a complete defense to any accountability and entitles the holder to dismissal of a § 1983 action at the earliest stage. Access to the courts to petition an impartial tribunal for justice is a fundamental constitutional right of Americans. Any limitation on the right to one's day in court should be no broader than absolutely necessary.

2. The party seeking immunity from liability under § 1983 must establish both that the immunity was firmly rooted in the common law in 1871 and that the immunity is necessary to advance the public policies this Court has identified. With respect to the first requirement, there was no established common-law immunity for private attorneys retained by governments. Many 19th Century attorneys, including many whose names are well known to this Court, represented federal, state, and local governments. But there was not a single instance where a private attorney retained by a government body to perform work similar to Petitioner's was granted immunity from tort liability.

The fact that in 19th Century America private attorneys often served as public prosecutors who were given absolute immunity does not entitle Petitioner to qualified immunity for legal work that had nothing to do with the public prosecution of criminal cases in the name of the state. A lawyer under those circumstances might be entitled to raise good faith as a defense at trial. But the attorney is not entitled to dismissal of the § 1983 case based on qualified immunity. Additionally, dicta in which this Court suggested that attorneys might be eligible for immunity for performing services "at the behest of the sovereign" is insufficient to support qualified immunity in this case.

The fact that there was no firmly rooted common law rule granting government-retained private attorneys tort immunity the inquiry and precludes the grant of qualified immunity in this case, regardless of the policy reasons that might support it.

3. The public policies that support the qualified immunity of government officials do not support extending that immunity to private attorneys. Generally, the Court looks to those policies to strike a balance between deterring misconduct and compensating its victims, on one hand, and protecting government's ability to perform its traditional functions. That balance loses its relevance when the actor is not a government official charged with serving the public good, but a private contractor more directly influenced by the profit motive and by competition.

Qualified immunity protects the public from officials whose fear of personal liability leads to unwarranted timidity in pursuing the public good. Immunity does not have the same impact on private contractors. Those contractors are seldom vested with broad discretion that may be chilled by fear of liability. Their duties are instead defined by the terms of their contracts and their desire to be paid accordingly. There is no public interest to be served by encouraging contractors to boldly and imaginatively depart from the requirements of their contracts. Even if fear of liability were creating a problem for the government entity, the solution would be to provide indemnity for the contractor, not to deprive the victims of misconduct of the remedy provided by § 1983.

Similarly, there is no indication that requiring private contractors to be accountable under § 1983 deters talented individuals from entering government service. Again, to the extent that fear of liability does create such a problem, the appropriate course of action is to provide indemnification.

Finally, the danger that government officials may become distracted by having to respond to § 1983 lawsuits is much less in the case of private contractors. The important consideration is the harm to the public good, not the burden or cost to the worker or private contractor. Nor is this the most important factor in striking the appropriate balance. In any event, requiring private parties such as Petitioner to defend their actions in court does not appear contrary to the public interest.

City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258 (1981).

This Court therefore has read § 1983 "in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Imbler*, 424 U.S. at 418. There was "no clear indication," Chief Justice Warren wrote for the Court in *Pierson v. Ray*, 386 U.S. 547 (1967), "that Congress meant to abolish wholesale all common-law immunities." *Id.* at 554. Consequently, in § 1983 actions this Court permits a defendant to assert an absolute or qualified immunity that "was so firmly rooted in the common law and was supported by such strong policy reasons" that if Congress in 1871 had wished to abolish the doctrine it would have done so explicitly. *Richardson v. McKnight*, 521 U.S. 399, 403 (1997).

This is the "legal source" of the qualified immunity which Petitioner here seeks to extend. *Id.* at 403; *Wyatt v. Cole*, 504 U.S. 158, 163 (1992). It is also clear from this Court's formulation that immunities in § 1983 actions are highly disfavored.

Pierson held that the common law's well-established absolute immunity for judges for actions taken on the bench may be raised as an affirmative defense to liability under § 1983. 386 U.S. at 554. Such an immunity was not available for police officers at common law, and so could not be invoked as a shield against a § 1983 action by arrested civil rights workers against the arresting officers. *Id.* at 555. In the absence of qualified immunity, the case could not be dismissed. *Id.* at 556. However, the officers were entitled to raise the defense at trial that they acted in good faith and with probable cause. *Id.* at 557.

Significantly, this Court did not veer from its fidelity to the intent of Congress to incorporate only those common law immunities that were well recognized in 1871. No public policy consideration, including the difficult lot of police officers, moved the Court to substitute its own views on that score.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court recognized qualified immunity, as distinguished from the good faith defense:

> [G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 818. "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (quoting *Harlow*, 457 U.S. at 819).

Thus, this Court has already answered, repeatedly and firmly, Petitioner's argument that important public policy concerns should sway this Court in favor of extending the scope of qualified immunity: It is for Congress to weigh those factors and strike the appropriate balance. "We do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy." *Tower v. Glover*, 467 U.S. 914, 922-23 (1984). This Court's "role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). Any extension of qualified immunity must hew closely to the intent of Congress to allow only those immunities that were widely recognized at common law in 1871.

B. Qualified Immunity Is a Limitation On a Remedial Cause of Action to Enforce Fundamental Constitutional Rights and Ought to Be Narrowly Construed.

By creating an express federal remedy, Congress sought to "enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity," including the protection of the Fourth Amendment, applicable to the states under the Fourteenth. *Monroe v. Pape*, 365 U.S. 167, 171-72 (1961). Congress was aware that a "damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees." *Owen*, 445 U.S. at 651. In determining whether such a party should be shielded by immunity, this Court has stated that the injustice that "many victims of municipal malfeasance would be left remediless" due to qualified immunity "should not be tolerated." *Id.*

As this Court has emphasized, Congress made its intent explicitly clear that the remedy it was creating is to be broadly construed:

The congressional debates surrounding the passage of § 1 of the Civil Rights Act of 1871, . . . confirm the expansive sweep of the statutory language. Representative Shellabarger, the author and manager of the bill in the House, explained in his introductory remarks the breadth of construction that the Act was to receive:

> I have a single remark to make in regard to the rule of interpretation of those provisions of the Constitution under which all the sections of the bill are framed. This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provision authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous, were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend

> > and give remedies for their wrongs to all the people.
>
> Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871) (hereinafter Globe App) Similar views of the Act's broad remedy for violations of federally protected rights were voiced by its supporters in both Houses of Congress. *See Monell v. New York City Dept. of Social Services*, 436 U.S. at 683-687.

Owen, 445 U.S. at 635-36.

This Court has noted that "an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow*, 457 U.S. at 814; *Butz v. Economou*, 438 U.S. 478, 506 (1978); *see also Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 410 (1971) ("For people in Bivens' shoes, it is damages or nothing"). As the Fifth Circuit has summarized, "courts are naturally loathe to clothe any person with an immunity which would frustrate the statute's design of providing vindication to those wronged by the misuse of state power.." *Marrero v. City of Hialeah*, 625 F.2d 499, 503 (5th Cir. 1980).

Accordingly, this Court has cautioned the lower courts that "it would defeat the promise of the statute to recognize any preexisting immunity without determining both the policies that it serves and its compatibility with the purposes of § 1983. *Only after careful inquiry into considerations of both history and policy* has the Court construed § 1983 to incorporate a particular immunity defense." *City of Newport News*, 453 U.S. at 259 (emphasis added).

Justice Kennedy addressing an issue very similar to the question presented in this case, warned against extending qualified immunity to private actors who were not accorded immunity at common law. He emphasized, "we are devising limitations to a remedial statute, enacted by the Congress," and thus "we may not transform what existed at common law based on our notions of policy or efficiency." *Wyatt*, 504 U.S at 171-72 (Kennedy, J., concurring).

C. Qualified Immunity Infringes Upon the Fundamental Right of Access to the Courts For Redress of Wrongful Injury and Ought to Be Narrowly Construed.

In deciding whether to expand the scope of qualified immunity, it is important to bear in mind that it serves as a complete defense to liability and "frees one who enjoys it from a lawsuit whether or not he acted wrongly." *Richardson,* 521 U.S. at 403. The defendant who establishes qualified immunity is entitled to dismissal of the action against him at its earliest stage, regardless of the merits of the plaintiff's claim and the extent of damage the defendant has caused. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation."); *see also* Sheldon Nahmod, *The Emerging Section 1983 Private Party Defense*, 26 Cardozo L. Rev. 81, 81 n.4 (2004) (stating that qualified immunity has been transformed "into the functional equivalent of absolute immunity, which protects against even the need to defend."); Jonathan M. Freiman, *The Problem of Qualified Immunity:*

How Conflating Microeconomics and Law Subverts the Constitution, 34 Idaho L. Rev. 61, 68 (1997) ("[Q]ualified immunity has pulled the door to the courthouse nearly shut, leaving a crack so thin that only the most battered plaintiffs can still squeeze through.").

This Court has often declared that access to the courts to seek redress for injury is a fundamental right protected by the Constitution. *See Borough of Duryea v. Guarnieri*, --- U.S. ----, 131 S. Ct. 2488, 2494 (2011) ("This Court's precedents confirm that the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes.") (collecting cases); *Haywood v. Drown*, 556 U.S. 729, 129 S. Ct. 2108, 2117 (2009) (where state sought to shield corrections officers from accountability in its trial courts, "New York is not at liberty to shut the courthouse door to federal claims that it considers at odds with its local policy.").

Indeed, this Court has noted that its decisions have grounded the right of access to courts in the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses. *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002) (citations omitted). It may be stated that "[t]he citizen's right to access an impartial tribunal to seek redress for official grievances is so fundamental and so well established that it is sometimes taken for granted." *Woodford v. Ngo*, 548 U.S. 81, 104 (2006) (Stevens, J., dissenting).

Accordingly, this Court does not "lightly impute to Congress an intent to invade freedoms" protected by the Bill of Rights, including "the right of access to the courts," *BE & K Constr. Co. v. N.L.R.B.*, 536 U.S. 516, 525 (2002), citing *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972), and "has been cautious in recognizing claims that government officials should be free of the obligation to answer for their acts in court." *Forrester v. White*, 484 U.S. 219, 223-24 (1988).

In sum, this Court has made clear that qualified immunity to § 1983 liability contravenes the expressed intent of Congress, undermines the enforcement of federal constitutional rights, and limits Americans' access to the courts to seek legal redress for injury. Therefore, Petitioner's request that qualified immunity be expanded to include government-retained private attorneys must be denied unless Petitioner has made a clear and compelling case for it. *Amicus* submits that Petitioner has failed to make that case.

II. THE COMMON LAW DID NOT RECOGNIZE TORT IMMUNITY FOR PRIVATE ATTORNEYS HIRED BY GOVERNMENT FOR INVESTIGATIVE PURPOSES.

This Court has consistently held that a party seeking to assert immunity from liability under § 1983 must persuade the court both that the immunity "was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.'" *Richardson*, 521 U.S. at 403 (quoting *Wyatt*, 504 U.S. at 164) (quoting

Owen, 445 U.S. at 637). *See also Wyatt*, 504 U.S. at 169-71 (Kennedy, J., concurring) (immunity depends upon "historical origins" and "public policy"). *Amicus* submits that Petitioner has fallen short on both requirements.

With respect to the first requirement, this Court has stated:

> Our initial inquiry is whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts. If an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court next considers whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions.

Malley, 475 U.S. at 339-40 (citations and internal quotation marks omitted). Only "[i]f parties seeking immunity were shielded from tort liability when Congress enacted the Civil Rights Act of 1871" does the Court consider whether considerations of public policy justify limiting the remedy Congress enacted. *Wyatt*, 504 U.S. at 164.

For example, this Court in *Harlow* observed that the common law recognized absolute immunity for officials "whose special functions or constitutional status requires complete protection from suit." *Harlow*, 457 U.S. at 806. These include legislators, in their legislative functions, judges, in their judicial functions, prosecutors and similar officials acting in their prosecutorial function, executive officers engaged in adjudicative functions, and the President of the United States. *Id.* at 807. *See also Doe v. Boland*, 630 F.3d 491 (6th Cir. 2011) (The immunity of parties and witnesses from subsequent damages liability for their testimony in judicial proceedings was well established in English common law; accordingly § 1983 does not permit recovery of damages against a private party for false testimony, even if given under color of state law.).

It is apparent from the outset that Petitioner is unable to demonstrate a firmly rooted common-law immunity from tort liability for private attorneys retained by governmental bodies in circumstances analogous to Petitioner's in this case. Instead, Petitioner invokes the names of great American lawyers of the 19th Century. Chief Justice John Marshall, Daniel Webster, and Abraham Lincoln all represented states and other government entities in various court cases—including cases before this Court—while in private practice. (Pet'r's Br. 18-20.) We also learn that three of the chief supporters of the Civil Rights Act of 1871 also represented state governments. (*Id.* at 20-21.) Petitioner declares that it was, in fact, quite common for state and local governments to retain private attorneys. (*Id.* at 15.) Even the federal government, did so prior to the advent of the Department of Justice in 1870. (*Id.* at 37.)[2]

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[2] Several *amici* have pointed out to this Court that state and local governments have increasingly privatized and outsourced their legal work for at least the past 25 years. (*Amici Curiae* League of California Cities Br. 4-9; *Amici Curiae* State of Kansas and Other States Br. 4-8; *Amicus Curiae* American Bar Ass'n Br. 6-12.) This trend has grown primarily

What Petitioner has failed to establish for this Court is the one historical element that is essential to his argument. Petitioner cannot point to a single instance in which any of these illustrious attorneys, or any other private attorney was granted immunity from liability for torts committed while retained by a government entity. Petitioner asks whether Abraham Lincoln should be "left holding the bag" after government employees have been granted immunity. (Pet'r's Br. 20.) The correct question is whether any court at about 1871 granted tort immunity to private attorneys retained by federal, state, or local governments to conduct investigations or perform similar tasks. Petitioner has not taken the first step toward meeting his burden of showing that such an immunity was firmly established at common law.

Petitioner and United States attach significance to the fact that private attorneys often acted as prosecutors in 19th Century America. (Pet'r's Br. 16; *Amicus Curiae* United States Br. 28-29.) It is true that government prosecutors and private attorneys who performed the functions of government prosecutors were accorded absolute immunity with respect to those activities. *Butz*, 438 U.S. at 508-12; *Imbler*, 424 U.S. at 418. That

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because retaining private attorneys is cheaper. (*Amici Curiae* League of California Cities Br. 5 & 6.)

That fact suggests that neither the private attorneys nor the governmental entities retaining them find the current practice under which such private attorneys are not entitled to qualified immunity unacceptably costly or burdensome. It surely does not make the case for subsidizing private attorneys by leaving victims of unconstitutional misconduct without remedy.

immunity is currently recognized where private attorneys prosecute cases for the state. *See, e.g., Day, Durham, Eldridge v. Gibson*, 332 F.3d 1019, 1021 (6th Cir. 2003) (absolute immunity available to private prosecutor).

Petitioner's legal work in this case, however, had nothing to do with the prosecution of criminal cases in the name of the state. He merely conducted an inquiry for an employer into possible misconduct by an employee. This Court has rejected the notion that recognition of absolute prosecutorial immunity at common law may serve as a basis for granting qualified immunity to private attorneys do not actually prosecute cases, but simply "set the wheels of government in motion by instigating a legal action." *Wyatt*, 504 U.S. at 164-65.

At most, the Court stated, private attorneys acting under state law in circumstances like Petitioner's might be entitled to raise the good faith defense at trial. However, "that would still not entitle them to what they sought and obtained in the courts below: the qualified immunity from suit accorded government officials under" *Harlow*. *Id.* at 165. *See also Duncan v. Peck*, 844 F.2d 1261, 1265 (6th Cir. 1988) (private attorney not entitled to qualified immunity where the court found "no evidence that the common law ever extended the immunity to include private citizens").

Petitioner also relies on Justice Breyer's statement for this Court in *Richardson* that the common law did recognize "a kind of immunity for certain private defendants, such as doctors or lawyers who performed services at the behest of the sovereign." *Id.* at 407. (*See* Pet'r's Br. 26.) It is not clear whether the Court had qualified immunity in mind, nor whether "at the behest of the sovereign" might include a contractual retainer. It is, moreover, doubtful that a municipality qualifies as "the sovereign." *See Alden v. Maine*, 527 U.S. 706, 756 (1999) (sovereign immunity "bars suits against States but not lesser entities," such as "a municipal corporation or other governmental entity which is not an arm of the State"). In any event, this small bit of dicta is woefully inadequate to meet Petitioner's burden in this case.

In the absence of an established and recognized immunity at common law for government-retained private attorneys, the Court's inquiry is complete. The Court does "not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy." *Buckley v. Fitzsimmons*, 509 U.S. 259, 278 (1993). Consequently, where "there is no historical tradition of immunity on which we can draw, our inquiry is at an end." *Id.*

III. THE POLICY REASONS SUPPORTING QUALIFIED IMMUNITY FOR GOVERNMENT EMPLOYEES DO NOT SUPPORT IMMUNITY FOR PRIVATE ATTORNEYS RETAINED BY GOVERNMENT.

Even apart from the absence of any historical basis at common law, expanding qualified immunity to government-retained private attorneys would not serve "the special policy concerns involved in suing government officials" and should therefore be rejected. *Wyatt*, 504 U.S. at 167 (citing *Harlow*, 457 U.S. at 813).

The Court looks to those policies because qualified immunity is designed to "strike a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions." *Wyatt*, 504 U.S. at 167. *Amicus* suggests that such a "balance" loses relevance where the conduct is not that of an official sworn to uphold the public good, but a private contractor guided by profit and market forces.

Nor does the "government's ability to perform its traditional functions" have any bearing on whether a private party may be accountable for carrying out its government contract in an illegal or unconstitutional manner. This Court specifically identified three policy considerations that justify qualified immunity for government employees. None of those policies supports extending that immunity to private attorneys retained by a municipal government in circumstances similar to this case.

In *Richardson*, the Supreme Court held that prison guards at a private, for-profit prison could not assert qualified immunity. This Court explicitly rejected the argument raised by Petitioner here (Pet'r's Br. 11), that private parties performing the same work as government employees are entitled to the same qualified immunity. 521 U.S. at 408-09. The Court instead restated that the source of law for immunity to § 1983 liability is historical proof that the claimed immunity was "firmly rooted" at common law *and* a showing that the immunity is justified by such strong reasons of public policy that Congress in 1871 would have taken note and intended to preserve the immunity. *Id.* at 403-04.

This Court has identified those policy considerations as, first, whether qualified immunity was needed to "protect[] the public from unwarranted timidity on the part of public officials"; second, whether qualified immunity would "ensure that talented candidates [are] not deterred by the threat of damages suits from entering public service"; and third, whether allowing § 1983 lawsuits would "distrac[t] officials from their governmental duties." *Id.* at 408 (internal quotations and citiations omitted); *see also Mitchell*, 472 U.S. at 526; *Harlow*, 457 U.S. at 816.

This Court in *Richardson* determined that these policies did not weigh in favor of permitting private prison guards to assert qualified immunity. 521 U.S. at 412. For similar reasons, Petitioner's bid for qualified immunity in this case also fails.

A. In the Case of Private Attorneys Retained By Government There Is Less Danger That Liability Will Cause Timidity On the Part of Officials In Their Conduct of Government Activities.

This Court has noted that when government officials are exposed to liability for damages, the threat of liability "can create perverse incentives that operate to inhibit officials in the proper performance of their duties [where] government officials are expected to make decisions that are impartial or imaginative, and that above all are informed by considerations other than the personal interests of the decisionmaker." *Forrester*, 484 U.S. at 223. *See also Will v. Hallock*, 546 U.S. 345, 353 (2006) ("The nub of qualified immunity is the need to induce officials to show reasonable initiative when the relevant law is not clearly established."); *Harlow*, 457 U.S. at 814 (Fear of being sued may "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.").

These considerations do not apply, or do not apply with the same force, in the case of private parties working as contractors for the government. Such contractors are "subject to the ordinary competitive pressures that normally help private firms adjust their behavior in response to the incentives that tort suits provide—pressures not necessarily present in government departments." *Richardson*, 521 U.S. at 412. The contractor is "not invested with the responsibility of executing the duties of a public official in the public interest," but rather by the desire to execute to provisions of the contract and to be paid accordingly. *Duncan*, 844 F.2d at 1264. Such private parties seldom exercise broad discretion; their duties are for the most part spelled out in the contract with the governmental entity. Thus, "unwarranted timidity is less likely present, or at least is not special, when a private company subject to competitive market pressures" is the actor. *Richardson*, 521 U.S. at 409. Nor is there any public interest to be served in encouraging bold or imaginative actions that depart from the governmental contract.

Indeed, if a contractor proves to be too timid in carrying out its responsibilities, the appropriate course is not to shield contractors from accountability, but to replace that contractor. Alternatively, if the public good would be served by shielding the contractor from liability for violating the constitutional rights, the answer is not to leave individual victims without remedy. It is instead for the governmental body to indemnify its contractor, thereby spreading the costs of harm equitably.

B. There Is Less Danger That Liability May Deter Qualified Workers From Entering Public Service.

The notion that potential personal liability of government workers under § 1983 may deter talented persons from entering government employment is a presumed, though unproven rationale for qualified immunity for government workers. It is clear, however, that the potential liability of private contractors cannot be viewed as a deterrent to qualified applicants for government service. *Wyatt*, 504 U.S. at 168.

To the extent that the potential liability of private contractors may be deemed a barrier to accomplishing a public good, the appropriate course is for the governmental entity to agree to indemnify the contractor. Nearly all jurisdictions in the United States provide for indemnification of government employees for civil liability for harm done within the scope of employment. *See Bd. of Cnty. Comm'rs of Bryan Cnty., v. Brown*, 520 U.S. 397, 436 (1997) (Breyer, J., dissenting) (stating that statutes in many states "authorize indemnification of employees found liable under § 1983 for actions within the scope of their employment."); *see also* Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 Vand. L. Rev. 583, 586-88 (1998) (discussing and citing secondary authorities on the issue of indemnification under § 1983).

C. There Is Less Danger That Litigation Will Distract Government Officials From Their Duties.

Finally, this Court has indicated that, quite apart from personal liability, the public good suffers when public officials face distractions from "undue interference with their duties and from potentially disabling threats" due to litigation. *Harlow*, 457 U.S. at 806; *see also Anderson*, 483 U.S. at 646 n.6 ("One of the purposes of the . . . qualified immunity standard is to protect public officials from the 'broad-ranging discovery' that can be 'peculiarly disruptive of effective government'").

This is not a decisive factor. This Court has been careful to note that "the risk of 'distraction' alone cannot be sufficient grounds for an immunity." *Richardson*, 521 U.S. at 411. Moreover, the Court's qualified immunity cases "do not contemplate the complete elimination of lawsuit-based distractions." *Id.*

This Court has also noted that the proper measure here is the impairment of the public interest, not the potential hardship visited upon the private contractor. *Wyatt*, 504 U.S. at 168. Additionally, the Court stated, the responsibility for discretionary actions that affect the public interest tend to be reserved to governmental officials. *Id.* Therefore, "unlike with government officials performing discretionary functions, the public interest will not be unduly impaired if private individuals are required to proceed to trial to resolve their legal disputes." *Id.*

In short, the nexus between private parties and the historic purposes of qualified immunity is simply too attenuated to justify such an extension of our doctrine of immunity." *Wyatt*, 504 U.S. at 168.

CONCLUSION

For the above reasons, the decision of the Ninth Circuit Court of Appeals below should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

ECORD
AND
BRIEFS

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No. 10-1018

In The
Supreme Court of the United States

◆

STEVE A. FILARSKY,

Petitioner,

v.

NICHOLAS B. DELIA,

Respondent.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

◆

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

◆

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QUESTION PRESENTED

Whether a lawyer retained to work with government employees in conducting an internal affairs investigation is precluded from asserting qualified immunity solely because of his status as a "private" lawyer rather than a government employee.

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INTEREST OF AMICUS CURIAE

Amicus curiae American Bar Association (ABA) respectfully submits this brief in support of petitioner, attorney Steve A. Filarsky.[1] The ABA urges that a loss of qualified immunity for private attorneys retained by government entities to provide legal services will expose them to a risk of liability they would not otherwise face, with the result that they will be substantially deterred from providing services that are essential for the proper performance of many government functions.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its nearly 400,000 members come from each of the fifty states and other jurisdictions. Membership includes attorneys in private practice, government service, corporate law departments, and public interest organizations, as well as legislators, judges, law professors, law students, and non-lawyer associates in related fields.[2]

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. All counsel of record consented to the filing of this brief.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No inference should be drawn that any member of the

(Continued on following page)

Since its inception, and as one of the cornerstones of its mission, the ABA has actively sought to improve the quality of the American legal system by "[p]romot[ing] competence, ethical conduct and professionalism," and lawyers have long viewed the practice of law as a public service.[3] The ABA MODEL RULES OF PROFESSIONAL CONDUCT ("ABA MODEL RULES"), which were first published as the ABA'S CANONS OF PROFESSIONAL ETHICS in 1908, reflect the profession's ethical mandate to provide legal services to, *inter alia*, government organizations.[4] *See* ABA MODEL RULE 6.1.

Judicial Division Council participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[3] *See* ABA Mission and Association Goals, *available at* http://www.abanet.org/about/goals.html.

[4] The ABA MODEL RULES, available at http://www.Americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html, are developed by task forces composed of members of the ABA and national, state, and local bar organizations, and then reviewed by academicians, practicing lawyers, and the judiciary prior to presentation to the ABA House of Delegates ("HOD"). The HOD is the ABA's policy making body and is composed of more than 550 representatives from states and territories, state and local bar associations, affiliated organizations, ABA sections, divisions and members, and the Attorney General of the United States, among others. The ABA Model Rules become official ABA policy after approval by vote of the HOD. Information on the HOD is available at http://www.americanbar.org/groups/leadership/house_of_delegates.html.

The standards for imposing liability on attorneys based on the delivery of legal services and, specifically, the threat of liability under 42 U.S.C. § 1983 ("Section 1983") for private counsel retained by government entities to perform legal services, are of intense concern to the ABA and to its Section of State and Local Government Law (the "Section"). The Section, which has a national membership of government lawyers, lawyers in private practice, legal academics, jurists, law students, and others, focuses on issues of importance to state, county, municipal and other government entities, including the issues of liability and defenses under Section 1983. *See, e.g.*, MARY MASSARON ROSS & EDWIN P. VOSS, JR., SWORD AND SHIELD: A PRACTICAL APPROACH TO SECTION 1983 LITIGATION (ABA SECTION OF STATE & LOCAL GOV'T LAW, 3d ed. 2006).

Having carefully considered the Ninth Circuit's conclusion that a private lawyer retained to provide legal services to a government entity is not entitled to qualified immunity merely because of his or her status as a "private" lawyer, the ABA respectfully asserts that this conclusion, if permitted to stand, will impose new and potentially significant liability risks on private counsel that will seriously impact the vital contributions they make to effective state and local government performance.

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SUMMARY OF ARGUMENT

Qualified immunity from Section 1983 suits is essential for private attorneys representing government clients. Governments frequently must retain private attorneys for the effective and efficient performance of core government functions. For smaller entities, it is the only practical way to obtain needed legal advice. Even those that can afford in-house counsel, however, may need to retain private counsel because of conflicts, or for economic or political reasons, because special expertise is needed. In fact, a state's ethics rules may require retention when government attorneys do not have or cannot acquire needed expertise. A decision that these private attorneys are not entitled to qualified immunity would significantly impact these practices.

Such a decision would also deter private attorneys from representing government entities. First, a new duty of care to an opposing party would be created in Section 1983 suits that would interfere with the attorney-client relationship. Second, the potential for Section 1983 suits would impose significant financial and reputational risks, with increased insurance costs and exposure to punitive damages passed on to government clients that today commonly receive reduced rates as a form of public service. Third, the private attorney may attempt to minimize Section 1983 risk by pursuing a less vigorous representation. Finally, the loss of qualified immunity would likely chill the profession's interest in encouraging public service and significantly impact the vital contributions made by private attorneys to effective government performance. Ensuring qualified immunity, on the other hand, would promote the strong public interest in the continuing representation of public entities by private counsel.

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ARGUMENT

Qualified immunity should be afforded to private attorneys when they act under color of state law in providing legal services to government entities. This Court repeatedly has stated that Section 1983 should not be read to abrogate common law immunities when they are needed to "ensure that talented candidates" will not be "deterred by the threat of damages suits" from providing "public service" and "principled and fearless decision-making." *Richardson v. McKnight*, 521 U.S. 399, 407-08 (1997) (internal quotations and citations omitted). As petitioner's brief demonstrates, the common law unquestionably afforded immunity defenses equally to government-employed attorneys and to private lawyers representing government entities. The critical service of private attorneys in the proper performance of important government functions has only increased since *Richardson* was decided. Without those immunities, however, the exposure to potential Section 1983 liability will deter many from undertaking these essential representations or, if undertaken, from providing the principled and fearless decision-making that is required.[5]

I. THE PRIVATE BAR PROVIDES GOVERNMENT ENTITIES WITH A BROAD ARRAY OF LEGAL SERVICES THAT ARE ESSENTIAL TO THE PROPER PERFORMANCE OF GOVERNMENT FUNCTIONS

State and local governments frequently must retain private counsel for the effective and efficient performance of core government functions. *See* U.S. CENSUS BUREAU, EMPLOYMENT OF MAJOR LOCAL GOVERNMENTS (May 2004) (thousands of government bodies have no in-house lawyers or legal staff).[6] Indeed, the need for outside counsel is especially critical outside of large municipalities. In Alaska, for example, "[m]ost small rural municipalities in the state do not need or have enough money to afford to hire a full-time municipal attorney. Municipal attorneys are often private practice attorneys who have a lot of experience working with municipal law." STATE OF ALASKA, DEPARTMENT OF COMMERCE, COMMUNITY

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[5] Because the issue before the Court is limited to qualified immunity, this brief does not discuss absolute immunity that should be applied when a private attorney is retained to prosecute a case. *See Day, Durham, Eldridge v. Gibson*, 332 F.3d 1019, 1021 (6th Cir. 2003) (private prosecutor entitled to absolute immunity).

[6] *Available at* http://www.census.gov/prod/2004pubs/gc023x1.pdf.

AND ECONOMIC DEVELOPMENT, COMMUNITY AND REGIONAL AFFAIRS, LOCAL GOVERNMENT HANDBOOK: LEGAL REQUIREMENTS – THE MUNICIPAL ATTORNEY (Apr. 18, 2003);[7] *see also* Lester D. Steinman, *Reducing Municipal Legal Costs Through Shared Legal Services*, 22 MUNICIPAL LAWYER 19 ("Not surprisingly, most municipal attorneys worked only part time for the government; those municipalities hiring full-time attorneys typically could only attract younger, inexperienced lawyers.").

The hard reality is that retention of private counsel is the only practical way for many smaller jurisdictions and government entities to obtain needed legal advice. Nor should this be expected to change in today's era of cut-backs and austerity, when local governments that previously had in-house legal departments are eliminating those positions and relying exclusively on private counsel. *See, e.g.*, Gus Burns, *Plan to shut down Saginaw's legal department could save taxpayers $200,000 per year, deputy manager says,* THE SAGINAW NEWS, Aug. 23, 2011, (City planned to eliminate legal department and to contract with outside counsel to reduce budget shortfall);[8] Tim Pfarr, *Council OKs Budget Cuts That Create Surplus*, NEWCASTLE-NEWS, Apr. 2, 2010, at 1

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[7] *Available at* http://www.dced.state.ak.us/dca/logon/pubs/LGH6-2B.pdf.

[8] *Available at* http://www.mlive.com/news/saginaw/index.ssf/2011/08/plan_to_shut_down_saginaws_leg.html.

(city terminated in-house attorney in favor of outside counsel in plan to eliminate budget deficit).

Even those government entities that can afford in-house legal departments often need to retain private counsel when conflicts or potential conflicts arise. *See, e.g.*, *Faith v. Bell*, No. C040663, 2002 WL 31820238 at *4 (Cal. Ct. App. Dec. 17, 2002) (private attorney retained when government's in-house counsel disqualified themselves because of conflict of interest); *Commonwealth* ex rel. *Clay County v. Sizemore*, 108 S.W.2d 733, 735 (Ky. 1937) ("[W]here the interest or duties of the county attorney are in conflict with the interests and responsibilities of the county, the fiscal court has power to engage independent counsel to represent it and to protect its interests."). *See also Romley v. Daughton*, 241 P.3d 518, 521 (Ariz. Ct. App. 2010) (private attorney retained to advise public body whether its attorney had conflict of interest).

In other instances, economic or political reasons may lead a government to conclude that private counsel is needed. *See, e.g.*, Daniel J. Capra, Lester Brickman, Michael Ciresi, Barbara S. Gillers & Robert Montgomery, *The Tobacco Litigation and Attorneys' Fees*, 67 FORDHAM L. REV. 2827 (1999) (states, including Florida, Minnesota, Mississippi, and Texas hired private attorneys to prosecute mass tort claims on contingency fee in 1990s tobacco litigation). Also, governments may need to augment their resources by retaining outside counsel to work with their legal departments on complex matters as an integrated team. *See, e.g.*, *Perdue v. Kenny A.* ex rel. *Winn*, 130 S. Ct. 1662, 1681 (2010) (in opposing plaintiffs' efforts to have foster-care system reformed, "the State spent $2.4 million on outside counsel (who, because they charge the State reduced rates, worked significantly more hours than that figure alone indicates) and tapped its own law department for an additional 5,200 hours of work."). Indeed, governments retain private lawyers to represent them in the defense of Section 1983 actions. *See, e.g.*, *Trant v. Towamencin Twp.*, No. Civ. A 99-134, 1999 WL 317032 at *4 (E.D. Pa. May 20, 1999) (for former Rule 15(c)(3) purposes, fact that township hired private attorney to represent township, police chief, and officer defendants for Section 1983 defense, "rather than maintaining a full office of government attorneys as does a large city such as Philadelphia, does not change this court's analysis or conclusion").

When special expertise is needed because of the subject matter or because of the court in which the matter is being heard, a government may conclude that private counsel is needed. *See, e.g.*, *Jefferson v. City of Tarrant*, 522 U.S. 75, 77 (1997) (now-Chief Justice Roberts represented city in Section 1983 case); *Yee v. City of Escondido*, 503 U.S. 519, 521 (1992) (private counsel Carter Phillips represented the city in regulatory takings case); *Bunting v. Oregon*, 243 U.S. 426, 430 (1917) (Felix Frankfurter represented the State of Oregon with its attorney general in a wage case).

Criminal prosecutions, insurance claims and the interpretation of government documents may also require private counsel with special expertise. *See, e.g.*, *Richardson*, 521 U.S. at 418 (1997) (Scalia, J., dissenting) (high-profile prosecutions may require government to retain private attorneys as prosecutors); *Indiana Ins. Co. v. Pana Cmty. Unit Sch. Dist. No. 8*, 314 F.3d 895, 897 (7th Cir. 2002) (private counsel represented municipal corporation in insurance coverage dispute); *In re Katrina Canal Breaches Consol. Litig.*, No. 05-4182, 2008 WL 3845228 at *2 (E.D. La. Aug. 13, 2008) (seven private law firms retained to represent State as putative class representative in State's attempt to recover insurance claims assigned to State); *County of Kauai* ex rel. *Nakazawa v. Baptiste*, 165 P.3d 916, 919 (Haw. 2007) (outside private counsel retained to represent county in case involving interpretation of county charter).

Where specialized expertise is needed, the retention of private counsel will not be merely prudent, but is required when government lawyers have an ethical duty to step aside under their state rules of professional conduct, most of which are modeled after the ABA MODEL RULES.[9] For example, ABA Model Rule 1.1 provides in pertinent part, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

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[9] *See, e.g.*, CAL. RULES OF PROF'L CONDUCT R. 3-110; FLA. RULES OF PROF'L CONDUCT R. 4-1.1; MICH. RULES OF PROF'L CONDUCT R. 1.1; TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.01.

As stated in the Commentary to Rule 1.1: "Competence includes the ability to discern when an undertaking requires specialized knowledge or experience that a lawyer does not have and requires that the lawyer either acquire the expertise, associate with a specialist, or decline the undertaking and refer it to a competent specialist [citations omitted]." MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. (2010); *see also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 97-405 (1997) (while lawyers serving as public officers or employees are singled out under some rules, "it has generally been assumed – correctly in our view – that such lawyers are in most other respects subject to the same obligations in representing their government client that apply to lawyers representing private clients").[10] Thus, under the pertinent state's ethics rules, a government entity may have no choice but to retain private counsel when its employed attorneys do not have or cannot acquire the expertise needed for an undertaking.

Finally, the representation of governments by private attorneys is not a recent development. *See, e.g.*, *Hopkins v. Clayton County*, 32 Iowa 15, 15 (1871)

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[10] *Available at* http://www.americanbar.org/groups/professional_responsibility/publications/ethics_opinions.html.

(county retained private attorney to prosecute capital murder case); *Blair v. City of Chicago*, 201 U.S. 400, 411 (1906) (Clarence Darrow, while in private practice, represented the city in a street railway franchise case). And with today's widespread use of private attorneys by government entities, a loss of qualified immunity for these attorneys would have a significant impact on this essential practice going forward.

II. DENYING QUALIFIED IMMUNITY TO PRIVATE LAWYERS IN SECTION 1983 SUITS WILL DETER THEM FROM REPRESENTING GOVERNMENT ENTITIES

The purpose of qualified immunity is to protect the public as a whole, not to protect private individuals. *Wyatt v. Cole*, 504 U.S. 158, 168 (1992). However, without the same qualified immunity enjoyed by their government-employee attorney counterparts, the potential for Section 1983 suits will deter private attorneys from representing government entities, to the detriment of the public interest. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (recognizing a consequence of Section 1983 liability is "deterrence of able people from public service").

As a general rule, lawyers do not owe duties to non-client third parties. *See, e.g.*, RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 51 (2000) (describing limited circumstances in which attorney would be liable to non-client third party); *Rubin v. Green*, 847 P.2d 1044, 1053 (Cal. 1993) ("litigation privilege" immunizes lawyers absolutely from tort liability to third parties). Ordinarily, an attorney would not be liable to a party opposing his or her client. RESTATEMENT (THIRD) OF LAW GOVERNING LAW § 51 cmt. c. ("A lawyer representing a party in litigation has no duty of care to the opposing party under this Section, and hence no liability for lack of care, except in unusual situations."). As stated by the Supreme Court of Hawaii, the "creation of a duty in favor of an adversary of the attorney's client would create an unacceptable conflict of interest. Not only would the adversary's interest interfere with the client's interests, the attorney's justifiable concern with being sued . . . would detrimentally interfere with the attorney-client relationship." *Buscher v. Boning*, 159 P.3d 814, 832 (Haw. 2007) (quoting *Myers v. Cohen*, 687 P.2d 6, 16 (Haw. Ct. App. 1984)).

A Section 1983 suit against a private attorney based on his or her representation of a government client would stand as an exception to this general prohibition. And Section 1983 litigation has multiplied in frequency over the past fifty years, with the vast majority of suits naming officials among the defendants. Dina Mishra, *When the Interests of Municipalities and Their Officials Diverge: Municipal Dual Representation and Conflicts of Interest in Section 1983 Litigation*, 119 YALE L.J. 86, 88 (2009); *see also Cleavinger v. Saxner*, 474 U.S. 193, 210-11 (1985) (noting increase since 1975 in Section 1983 cases by prisoners). Because government employee defendants are usually dismissed from these cases, it is all but certain that private attorneys without qualified immunity will be named as defendants when possible and will not be dismissed. In fact, in the instant case, all of the other defendants have been dismissed as immune from suit, leaving petitioner as the sole remaining defendant.

Critically, the "good faith" defense is not an adequate substitute for qualified immunity. The "good faith" defense is an affirmative defense, on which the defendant has the burden. On the other hand, since *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), qualified immunity permits meritless lawsuits to be disposed of quickly: discovery is deferred until the defendant's motion for summary judgment on qualified immunity is decided and, while the "good faith" defense is decided by the jury at trial, the motion on qualified immunity is determined by the court and, if denied, an interlocutory appeal may be taken. Sheldon Nahmod, *The Emerging Section 1983 Private Party Defense*, 26 CARDOZO L. REV. 81, 95-96 (2004).

Further, the potential for Section 1983 suits would pose significant monetary risks to the private bar. Private attorneys may be faced with the perception that they are the only "deep pocket" available for an alleged civil rights injury. And they may be required to defend against a claim for punitive damages. *Smith v. Wade*, 461 U.S. 30, 56 (1983) ("We hold that a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others."). Private attorneys may also face adverse publicity due to the public nature of Section 1983 litigation, which could affect their reputations and their private practices, even if the case is frivolous and later dismissed. The ensuing financial costs, including disruption of business, settlements necessitated by the risks posed by punitive damage trials, and the related increases in insurance premiums and deductibles, would be substantial. And this Court has already recognized the likelihood that similar financial effects of unconstrained exposure to Section 1983 suits would deter government service. *See, e.g.*, *Wood v. Strickland*, 420 U.S. 308, 320 (1975) (recognizing qualified immunity because "[t]he most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure").

Without qualified immunity, the private attorneys who do continue to represent government clients will be forced to pass on the costs of increased risk, making legal services less affordable to their government clients. This will be all the more unfortunate in that currently, public representation is commonly provided at reduced rates as a form of public service. *See, e.g.*, *Perdue,* 130 S. Ct. at 1681 (outside counsel charged State reduced rates); Kevin Sack, *Lawyer Opposing Health Law is Familiar to the Justices*, N.Y. TIMES, Oct. 26, 2011, at A1 (Paul D. Clements contracted with Florida and other states at discounted rates); Tina Kleist, *Colantuono new Grass Valley lawyer*, THE UNION, Oct. 25, 2011, (city hired attorney as city attorney who offered discounted rates);[11] Press Release, City of South Bend, Ind., *City intervenes in I&M base rate case*, (Nov. 3, 2011) (city negotiated discounted rate with attorneys for representation).[12]

Section 1983 suits would also carry the likelihood of disrupting and distracting private attorneys from performing their public duties. *See Mitchell*, 472 U.S. at 526 (immunity designed in part to prevent the "distraction of officials from their governmental duties"); *Wyatt*, 504 U.S. at 167 ("Accordingly, we have recognized qualified immunity for government officials where it was necessary to preserve their ability to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service."); *Harlow*, 457 U.S. at 816 (1982) (recognizing that Section 1983 actions could be a "deterrence of able people from public service").

Instead, the public has an interest in "encouraging the vigorous exercise of official authority, by contributing to principled and fearless decision-making, and by responding to the concern that threatened liability would, in Judge Hand's words, 'dampen the ardour of all but the most resolute, or the most irresponsible,' public officials." *Richardson*, 521 U.S. at 408 (internal quotations and citations omitted). Without qualified immunity, the private attorney may attempt to minimize the risk of Section 1983 liability by pursuing a less aggressive strategy or one aimed at settlement that includes a release from personal liability.

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[11] *Available at* http://www.theunion.com/article/20111025/NEWS/111029904/1001&parentprofile=10533.

[12] *Available at* http://www.southbendin.gov/news_detail_T13_R684.asp.

Finally, the loss of qualified immunity would likely chill the profession's interest in encouraging lawyers to serve public entities, whether through government service as an employee or the representation of government clients. Indeed, the ABA's MODEL RULES encourage lawyers to provide representation to public sector clients, which can include:

> [The] delivery of legal services at no fee or substantially reduced fee to . . . *governmental and educational organizations* in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate. . . .

MODEL RULES OF PROF'L CONDUCT R. 6.1 (emphasis added).

Lawyers have long seen the practice of law as a public service. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 371 (1977) ("Early lawyers in Great Britain viewed the law as a form of public service, rather than as a means of earning a living, and they looked down on 'trade' as unseemly."). It has been said that public service "is the highest calling of those in our profession." Phillip G. Schrag, *Why Would Anyone Want To Be A Public Interest Lawyer?*, GEO. PUB. LAW RESEARCH PAPER NO. 10-52 (Sept. 23, 2003).[13] The loss of qualified immunity, however, would significantly impact the vital contributions that private attorneys make to effective government performance. On the other hand, ensuring qualified immunity would promote the strong public interest in the continuing representation of public entities by private counsel.

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[13] *Available at* http://scholarship.law.georgetown.edu/fac_lectures/1.

CONCLUSION

For the reasons stated above, amicus curiae American Bar Association requests that this Court reverse the decision of the Ninth Circuit.

Respectfully submitted,

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Supreme Court of the United States

STEVE A. FILARSKY,
Petitioner,
v.
NICHOLAS B. DELIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae DRI—The Voice of the Defense Bar ("DRI") is an international organization that includes more than 23,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys and the civil justice system, to promote the role of the defense attorney, to improve the civil justice system, and to preserve the civil jury. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and consistent. To promote these objectives, DRI participates as *amicus curiae* in cases raising issues of importance to its members, their clients, and the judicial system.

This is such a case. Private attorneys frequently work with government agencies in the same capacity as do attorneys who are permanently employed by the government. The decision below, however, adopts an artificial line between the two types of lawyers, and exposes private attorneys to liability risks from which this Court has taken pains to protect permanent government employees. Neither logic nor history calls for such an arbitrary distinction.

Many courts nonetheless have reached similar results in reliance on this Court's opinion in *Richardson v. McKnight*, 521 U.S. 399 (1997). DRI respectfully submits that *Richardson* was wrongly decided and has increased the costs and risks for private attorneys and other individuals working with government agencies. Left uncorrected, the decision portends a continuation of the deluge of litigation that has come about since *Richardson* was decided. Accordingly, DRI urges the Court to reverse the decision below and to overturn *Richardson*.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation and submission of this brief. Both Petitioner and Respondent have consented to the filing of this brief. Letters showing the parties' consent are attached.

SUMMARY OF THE ARGUMENT

Petitioner Steve A. Filarsky is a private attorney who was retained by the city of Rialto, California, to assist with an internal affairs investigation. Pet. Br. 3. In the course of the investigation, Petitioner worked closely with government supervisors, who independently decided whether to adopt his advice. *Id.* at 4-5. On these facts, as Petitioner explains, *id.* at 28-30, he is entitled to qualified immunity even under this Court's decision in *Richardson*. *See* 521 U.S. at 407 ("Apparently the law *did* provide a kind of immunity for certain private defendants, such as doctors or lawyers who performed services at the behest of the sovereign."); *id.* at 413 (suggesting that immunity would apply to "a private individual briefly associated with a government body, serving as an adjunct to government in an essential government activity or acting under close official supervision").

Reversing the Ninth Circuit's decision on that limited basis, however, would do nothing to resolve the inconsistent standards and decisions that have plagued the lower courts since *Richardson* was decided. DRI respectfully submits that *Richardson* rests on an incorrect premise, employs a faulty historical analysis, and creates a complex and unworkable standard—all in the name of purported policy benefits that are uncertain at best. Thus, the proper course is not just to limit *Richardson*, but to overrule it.

Richardson's first mistake was its rejection of the "functional approach" that has long guided this Court's qualified immunity case law. Incorrectly asserting that this Court has not applied a functional approach to determine qualified immunity, *Richardson* instead used a complex mix of historical and policy-focused reasoning. This was error.

The Court then compounded its mistake by inferring a dispositive legal distinction from inconclusive historical evidence. Instead of concluding, as it should have, that the historical record provided no basis to treat private actors and government employees any differently, the *Richardson* Court erroneously concluded that the lack of a clear answer was grounds to draw an artificial line between private individuals and permanent government employees performing the same work for the government.

The *Richardson* Court's policy analysis was equally flawed. The Court recited various benefits of qualified immunity that it asserted were not applicable when the beneficiaries of such immunity are private individuals or entities. But the Court failed to offer a sound reason for differentiating between functionally identical government employees and private contractors. At the same time, the Court qualified its holding so thoroughly, and created such doctrinal complexity, that litigation and confusion have abounded in the decision's wake.

Finally, the reasoning set forth in *Richardson* has proven unworkable in the lower courts. Thus, even if *Richardson* had not been a sharp break from this Court's precedent, the general principle favoring *stare decisis* would be overcome by the costs that

Richardson's incoherence has imposed on courts, litigants, and anyone attempting to discern what risks they might face in taking on work for the government. To avoid deterring behavior that is in the public interest, clear rules are necessary. Accordingly, this Court should use the opportunity presented here to revisit and overturn *Richardson*.

ARGUMENT

I. THE PREMISE UNDERLYING *RICHARDSON*—THAT THE COURT DOES NOT USE A "FUNCTIONAL APPROACH" TO DETERMINE THE APPLICABILITY OF QUALIFIED IMMUNITY—IS INCORRECT.

1. The question before the Court in *Richardson* was "whether prison guards who are employees of a private prison management firm are entitled to a qualified immunity from suit by prisoners charging a violation" of § 1983. 521 U.S. at 401. In answering that question, the majority decided "to look both to history and to the purposes that underlie government employee immunity." *Id.* at 404. Significantly, the Court expressly disclaimed a "functional approach" in determining whether qualified immunity extended to private prison guards in the same measure as prison guards employed by a government agency. *Id.* at 408.

In particular, the Court rejected the guards' argument that "[s]ince private prison guards perform the same work as state prison guards, ... they must require immunity to a similar degree." *Id.* That argument was said to be unsupported in the Court's case law:

> To say this ... is to misread this Court's precedents. The Court has sometimes applied a functional approach in immunity cases, but *only to*

> *decide which type of immunity*—absolute or qualified—a public officer should receive. And it *never* has held that the mere performance of a governmental function could make the difference between unlimited § 1983 liability and qualified immunity.

Id. (citations omitted) (emphases added).

This fundamental premise of the *Richardson* majority's decision was erroneous. Indeed, the doctrine of qualified immunity was born out of functional considerations, and functional considerations have consistently directed its application by this Court. As the Court summarized in *Harlow v. Fitzgerald*, "in general our cases have followed a 'functional' approach to immunity law." 457 U.S. 800, 810 (1982).

2. Before *Harlow*, the Court had recognized a "good faith" defense to liability under § 1983. *See id.* at 815-16. "Good faith" had both an objective and a subjective component: the defendant would not be "immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of" the affected person, *or* "if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury." *Wood v. Strickland*, 420 U.S. 308, 322 (1975); *accord Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974), *abrogated by Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Unlike qualified immunity, the good faith test had direct roots in the common law. *See, e.g.*, *Procunier v. Navarette*, 434 U.S. 555, 561 (1978) (noting that the good faith defense was an element of the construction of § 1983 "as not intending wholesale revocation of the common-law immunity afforded government officials"); *Wood*, 420 U.S. at 320. However, the good faith test also proved impractical be-

cause it depended on a factbound, subjective assessment and was thus ineffective in shielding defendants, even those who had acted in good faith, from litigation prior to trial.

For this reason, *Harlow* departed from the common law, eschewed the "good faith" defense, and adopted a more functional and pragmatic test. The *Harlow* Court found persuasive "arguments that the dismissal of insubstantial lawsuits without trial—a factor presupposed in the balance of competing interests struck by our prior cases—requires an adjustment of the 'good faith' standard established by our decisions." 457 U.S. at 814-15. As the Court explained, a new approach to qualified immunity was warranted in order to avoid the imposition of "substantial costs" incurred in asserting the good faith defense. *Id.* at 816-17 ("[I]t now is clear that substantial costs attend the litigation of the subjective good faith of government officials."); *see id.* ("Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.") (footnote omitted).

To avoid these costs and disruptions, the Court settled on the now-familiar standard for qualified immunity: defendants would be "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Jettisoning the good faith defense in favor of this more expedient version of qualified immunity was deemed consistent with the pragmatic goals of the doctrine. "The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative." *Id.* at 813-14. Thus, practical and functional considerations—not history—mandated that the "balance" be re-struck to achieve better results.

3. Since *Harlow*'s institution of the qualified immunity test that remains in place today, the Court has repeatedly recognized the central role of functionality and practicality in the qualified immunity analysis. In *Anderson v. Creighton*, 483 U.S. 635 (1987), for example, the Court made clear that, although the "'common law tradition'" is relevant to determining the scope of immunity, "we have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law." *Id.* at 644-45. Indeed, the Court emphasized that fidelity to the common law was "plainly contradicted by *Harlow*, where the court *completely reformulated* qualified immunity along principles *not at all embodied in the common law*" and "clearly expressed the understanding" that qualified immunity "would be applied 'across the board.'" *Id.* (emphasis added) (quoting *Harlow*, 457 U.S. at 821 (Brennan, J., concurring)). The *Anderson* Court adhered to *Harlow* and rejected added "complexity" that would "utterly defeat[]" the security qualified immunity was meant to provide. *Id.* at 645-46. The bottom line was clear: officials need not "entangl[e] themselves in the vagaries of the English and American common law." *Id.* at 646.

The Court even acknowledged the functional foundation of qualified immunity in *Wyatt v. Cole*, 504 U.S. 158 (1992), the case on which the *Richardson* majority extensively relied. *See* 521 U.S. at 402-04 (describing *Wyatt* as "pertinent authority"). The *Wyatt* Court recognized "[t]hat *Harlow* completely reformulated qualified immunity along principles not at all embodied in the common law." 504 U.S. at 166 (internal quotation marks omitted). And it observed that "[q]ualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions." *Id.* at 167 (citing, *inter alia*, *Harlow*, 457 U.S. at 819). Likewise, in dissent, Chief Justice Rehnquist noted the Court's "abandon[ment of] a strictly historical approach to § 1983 immunities." *Id.* at 179 (Rehnquist, J., dissenting).

In view of these authorities, it is hardly surprising that the Court has repeatedly made express its commitment to a functional analysis of qualified immunity. *E.g.*, *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983) ("[O]ur cases clearly indicate that immunity analysis rests on functional categories, not on the status of the defendant."); *Forrester v. White*, 484 U.S. 219, 224 (1988) ("Running through our cases, with fair consistency, is a 'functional' approach to immunity questions ...."); *see generally Richardson*, 521 U.S. at 416 (collecting cases) (Scalia, J., dissenting). After all, the whole point of the qualified immunity doctrine is to eliminate unwarranted distractions and disincentives, and thus to help individuals function better at work. This Court's precedent cannot be squared with the *Richardson* majority's assertion that the Court has taken a "functional approach" "only to decide which type of immunity—absolute or qualified—a public officer should receive." *Id.* at 408. Because *Richardson* rests on a faulty premise that is inconsistent with prior case law, the Court should reconsider *Richardson* and return to the functional analysis that previously guided qualified immunity determinations.

II. IN ANY EVENT, HISTORY DOES NOT SUPPORT *RICHARDSON'S* CONCLUSION.

Quite apart from *Richardson*'s error in eschewing a functional approach, the history of immunity for those performing government functions does not support the result reached in *Richardson*. In dissent, Justice Scalia cited two cases demonstrating that contemporaneous with the enactment of § 1983, private officials likely enjoyed immunity from liability for actions taken under color of state law. *See Williams v. Adams*, 85 Mass. (3 Allen) 171 (1861) (holding that prisoners could not recover damages for negligence against the master of a house of correction, who appeared to be "no more a 'public officer' than the head of a private company running a prison," 521 U.S. at 415 & n.1); *Alamango v. Bd. of Supervisors*, 25 Hun. 551 (N.Y. 1881) (holding that "supervisors charged under state law with maintaining a penitentiary were immune from prisoner lawsuits," 521 U.S. at 417).

The majority brushed aside these authorities, contending that they were insufficient to "prove the existence" of a "tradition" of qualified immunity for private prison guards. *See Richardson*, 521 U.S. at 406 (stating that *Alamango* stands for the proposition that there was "no cause of action against [a] private contractor where [the] contractor [was] designated [a] state instrumentality by statute"; asserting that *Williams* did not "involve a private prison operator"). In doing so, however, the Court overlooked another critical flaw in its analysis—namely, that there is no historical basis for *distinguishing* between state officials and independent contractors doing the work of state officials. The historical lineage is essentially the same for both groups. *id.* at 414-15 (Scalia, J., dissenting) ("The opinion observes that private jailers existed in the 19th century, and that they were successfully sued by prisoners. But one could just as easily show that government-employed jailers were successfully sued at common law, often with no mention of possible immunity ...."). To the extent that history, and not functionality, should guide the contours of the qualified immunity analysis, there is no basis for the majority's artificial line.

Indeed, historically, the lines between public and private actors were frequently blurred. The career government employee is a relatively modern phenomenon. In the late nineteenth century, when § 1983 was enacted, what now appear to be quintessentially government jobs were routinely performed by private individuals. Accordingly, it was often difficult to discern the difference between the two types of government workers:

> Private police agencies offering patrol and detection services, and often run by former police officers, began to operate in major American cities in the 1840s. The line between public and private policing was *frequently hazy*. Private detectives and privately employed patrol personnel often were publicly appointed as "special policemen," and "the means and objects of detective work," in particular, "*made it difficult to distinguish* between those on the public payroll and private detectives."

David A. Sklansky, *The Private Police*, 46 UCLA L. Rev. 1165, 1210 (1999) (emphases added) (footnotes omitted). While public police departments became more common in urban centers in the late nineteenth century, "[s]tatewide police departments were mostly nonexistent, and the federal government used private guards and detectives for its occasional police work; outside city limits there thus was virtually no public police protection." *Id.* at 1211 (footnotes omitted). To fill the growing need for police protection felt with the rise of railroads and industrial operations, "new forms of private policing emerged," including "company police" hired by railroads and industrialists and "the national private police agency, epitomized in the late nineteenth century by the Pinkerton agency." *Id.*

Similarly, "[p]ublic prosecutors as we know them today were uncommon in 1871." Anthony Meier, Note, *Prosecutorial Immunity: Can § 1983 Provide an Effective Deterrent to Prosecutorial Misconduct?*, 30 Ariz. St. L.J. 1167, 1172 (1998) (citing *Kalina v. Fletcher*, 522 U.S. 118, 124 n.11 (1997)). Instead, "American citizens continued to privately prosecute criminal cases in many locales during the nineteenth century. ... Thus, '[p]arents of young women prosecuted men for seduction; husbands prosecuted their wives' paramours for adultery; wives prosecuted their husbands for desertion.'" John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 Ark. L. Rev. 511, 518 (1994) (alteration in original) (footnote omitted) (quoting Allen Steinberg, *The Transformation of Criminal Justice: Philadelphia, 1800-1880*, at 48 (1989)). Many states continued to allow the use of private prosecutors to pursue criminal charges in the late nineteenth century, while only a few began to ban the practice in that period. *Id.* at 518-20 & nn.29-31 (citing cases). *See also* Pet. Br. at 15-17.

In light of this historical picture, it is understandable that the drafters of § 1983 did not contemplate the imposition of formal, rigid lines between government employees and private individuals performing work for the government. Such a line would serve no purpose. The overarching reason for the Civil Rights Act of 1871, ch. 22, 17 Stat. 13, was the protection of individual rights. *See* David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 Nw. U. L. Rev. 497, 539-42 (1992). This purpose does not distinguish between state employees and independent contractors doing the state's work.

Further, to the extent that the text of § 1983 evinces any distinction at all, it is the exact opposite of the one *Richardson* adopted. Section 1983 provides a cause of action against state officials acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia." 42 U.S.C. § 1983. Ironically, as a result of *Richardson*, under the decision below, the only defendant who may be held liable is the only person who was *not* a state official. That assuredly was not the intention behind § 1983. *See* Scott C. Arakaki & Robert E. Badger, Jr., Note, Wyatt v. Cole *and Qualified Immunity for Private Parties in Section 1983 Suits*, 69 Notre Dame L. Rev. 735, 759 (1994) ("Holding private parties to a higher level of expertise than public officials runs counter to section 1983, which was intended to uphold individual rights from state actions, not the acts of other individuals."). As Chief Justice Rehnquist observed in his *Wyatt* dissent:

> Our § 1983 jurisprudence has gone very far afield indeed, when it subjects private parties to greater risk than their public counterparts, despite the fact that § 1983's historic purpose was "to prevent *state officials* from using the cloak of their authority under state law to violate rights protected against state infringement."

Wyatt, 504 U.S. at 180 (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 948 (1982)); *see also id.* ("it is at least passing strange to conclude that private individuals are acting 'under color of law' because they invoke a state garnishment statute and the aid of state officers, but yet deny them the immunity to which those same state officers are entitled, simply because the private parties are not state employees") (citation omitted).

III. POLICY CONSIDERATIONS DO NOT SUPPORT *RICHARDSON*'S CONCLUSION.

Richardson's analysis is equally unsupported by policy concerns. In an attempt to support its conclusion, the *Richardson* Court engaged in a policy analysis that rests on untested speculation and pure conjecture. 521 U.S. at 409-12.

The majority first suggested that the major benefit of qualified immunity for government employees—reducing "unwarranted timidity"—"is less likely present, or at least is not special, when a private company subject to competitive market pressures" performs services for the government. *Id.* at 409. But, as Justice Scalia noted in dissent, "it is fanciful to speak of the consequences of 'market' pressures in a regime where public officials are the only purchaser, and other people's money the medium of payment." *Id.* at 418-19. Further, the majority offered no support for its assessment of the comparative psychology of permanent government employees and others doing work for the government.

The majority next stated that "'privatization'" avoids the concern that qualified candidates would be deterred by the threat of suits for damages because of the prospect of "comprehensive insurance-coverage." *Id.* at 411. The majority did not explain, however, why the availability of insurance—which often exists for both private and government entities—compels a different result for private actors working for the government. *See id.* at 420 (Scalia, J., dissenting).

Finally, the majority asserted that "[b]ecause privatization law also frees the private prison-management firm from many civil service law restraints, it permits the private firm, unlike a government department, to offset any increased employee liability risk with higher pay or extra benefits." *Id.* at 411 (citation omitted). But this observation, too, fails to distinguish between government and private entities: just like private companies, "governments *need not* have civil-service salary encrustations (or can exempt prisons from them); and hence governments, no more than private prison employers, have any *need* for § 1983 immunity." *Id.* at 421 (Scalia, J., dissenting).[2]

The majority's unrealized policy justifications can be contrasted with the undeniable costs of the majority's approach. With its closing "caveats," the majority created a road map for further litigation:

> [W]e have answered the immunity question *narrowly*, in the context, in which it arose. That context is one in which a private firm, *systematically* organized to assume a *major lengthy administrative* task (managing an institution) with *limited direct* supervision by the government, undertakes that task for profit and potentially in competition with other firms. The case does not involve a private individual *briefly* associated with a government body, serving as an *adjunct* to government in an *essential* government activity or acting under *close* official supervision.

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[2] As Justice Scalia further noted, "it is poetic justice (or poetic revenge) that the Court should use one of the principal economic benefits of 'prison out-sourcing'—namely, the avoidance of civil-service salary and tenure encrustations—as the justification for a legal rule rending out-sourcing more expensive." 521 U.S. at 420-21.

Id. at 413 (emphases added). The litany of adjectives and other qualifiers only underscores the fertile ground for future lawsuits generated by *Richardson*—as does the curious potential line between a "private firm" and a "private individual." In addition, further sowing confusion is the novel and unexplained concept of "an adjunct to government," coupled with the majority's simultaneous embrace, *see id.*, and disavowal, *see id.* at 409 (relying on government function "bristles with difficulty, particularly since, in many areas, government and private industry may engage in fundamentally similar activities"), of the relevance of "essential government functions." *Cf. Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985) (rejecting "as unsound in principle and unworkable in practice, a rule ... that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional'").

It is exactly such confusion that the *Anderson* Court feared and rejected. *See* 483 U.S. at 643. In *Anderson*, the Court declined to follow an approach that "would introduce into qualified immunity analysis a complexity rivaling that which we found sufficiently daunting to deter us from tailoring the doctrine to the nature of officials' duties or of the rights allegedly violated." *Id.* at 645. And the Court emphasized that introducing such "complexity" into the qualified immunity analysis would defeat its very purpose:

> The general rule of qualified immunity is intended to provide government officials with the ability "reasonably [to] anticipate when their conduct may give rise to liability for damages." Where that rule is applicable, officials can know that they will not be held personally liable as

> long as their actions are reasonable in light of current American law. That security would be utterly defeated if officials were unable to determine whether they were protected by the rule without entangling themselves in the vagaries of the English and American common law. We are unwilling to Balkanize the rule of qualified immunity ....

Id. at 646 (citation omitted) (alteration in original).

The inevitable result of such a complex analysis has come to pass: litigation and ambiguity have ensued. From the decision in *Richardson* through March 2010, there has been a "deluge of more than one hundred cases so far over whether qualified immunity applies," creating "an added cost, not considered by *Richardson*, that has been and will continue to be passed on to society." *Developments in the Law—State Action and the Public/Private Distinction: Private Party Immunity from Section 1983 Suits*, 123 Harv. L. Rev. 1266, 1278 (2010). In response to this flood of suits, "[l]ower courts have attempted to apply [the *Richardson*] standard, but they have been confused by *Richardson*'s use of precedent and the complex mix of factors in its analysis and have reached divergent conclusions about various categories of private actors." *Id.* at 1267. Specifically:

> Seven circuits have used *Richardson* as a test, refusing to grant private actors qualified immunity in many circumstances. While only one circuit has explicitly granted private actors qualified immunity under *Richardson*, others have arguably done so implicitly, so immunity is not always categorically precluded. One circuit has held that qualified immunity applied in every case it has considered, though it has not relied on *Wyatt* or *Richardson*. The remaining four cir-

> cuits have no holding applying *Richardson*. Much litigation continues at the district court level without circuitwide resolution.

Id. at 1271 (footnotes omitted).

In sum, any policy benefits from *Richardson*'s analysis are, at best, uncertain. At the same time, the Court's complex and qualified opinion has imposed very real costs on firms and individuals working with the government, as well as litigants and the judicial system, in the form of a multiplicity of lawsuits and the lack of a uniform standard. *See id.* at 1277 ("Patchwork liability across jurisdictions raises privatization costs as firms adapt to each jurisdiction's rules, requiring differences in benefits and personnel practices even within a state."); *cf. also Wyatt*, 504 U.S. at 179 (Rehnquist, C.J., dissenting) ("today's decision will only manage to increase litigation costs needlessly for hapless defendants"). The decision has also made it virtually impossible to provide reliable legal advice to clients who choose to provide services to the government. Accordingly, this Court should take the opportunity to overrule *Richardson* in favor of a simple and straightforward functional approach, consistent with the origins of qualified immunity.

IV. *STARE DECISIS* IS NOT A BARRIER TO OVERTURNING *RICHARDSON*.

The doctrine of *stare decisis* should not prevent the Court from overruling *Richardson*. "*Stare decisis* is a 'principle of policy,' and not 'an inexorable command.'" *United States v. IBM Corp.*, 517 U.S. 843, 856 (1996). "[W]hen governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). "'Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned.' We have also examined whether 'experience has pointed up the precedent's shortcomings.'" *Citizens United v. FEC*, 130 S. Ct. 876, 912 (2010) (citations omitted). And, *stare decisis* should be given less weight when the precedent at issue is itself a departure from prior case law. *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 231 (1995) (plurality opinion) ("Remaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it ....").

Together, these factors demonstrate that correcting the erroneous and costly ruling in *Richardson* strongly outweighs any general preference in favor of *stare decisis*. As demonstrated above, *Richardson* was wrongly decided. The Court's opinion rests on the faulty premise that the Court had not previously adopted a "functional approach" in determining qualified immunity. It then relies on an inaccurate historical understanding and reaches a result that will support policy interests that are speculative and uncertain at best. And the *Richardson* analysis has proved entirely unworkable for the lower courts. Specifically, the *Richardson* majority adopted a multivariate analysis with a host of factors of uncertain origin and application. The complexity and opacity of the Court's reasoning has led to a deluge in litigation and left lower courts and litigants uncertain how to proceed.

Moreover, "[n]o serious reliance interests are at stake." *Citizens United*, 130 S. Ct. at 913. Reliance interests "are at their acme in cases involving property and contract rights." *Payne*, 501 U.S. at 828. But potential tort victims do not organize their affairs on the ground that they will likely have an easier time suing private individuals performing government functions than government employees. At the same time, however, many private individuals employed by government agencies—like Petitioner here—likely imagine that they will enjoy the same immunities as permanent government employees performing precisely the same functions.

Finally, although Section 1983 is a statute, and the Court typically applies a "general presumption that legislative changes should be left to Congress," *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997), the qualified immunity doctrines associated with Section 1983 are judicial creations. *See Imbler v. Pachtman*, 424 U.S. 409, 417 (1976) (Section 1983 "creates a species of tort liability that on its face admits of no immunities"); *Wyatt*, 504 U.S. at 163-64 (this Court has "accorded certain government officials either absolute or qualified immunity from suit"). The "general presumption" as to legislative changes thus has little force here. *Cf. Khan*, 522 U.S. at 20 ("the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress 'expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition'"). Indeed, "[r]evisiting precedent is particularly appropriate where, as here, a departure would not upset expectations, the precedent consists of a judge-made rule that was recently adopted to improve the operation of the courts, and experience has pointed up the precedent's shortcomings." *Pearson v. Callahan*, 555 U.S. 223, 233 (2009). *Stare decisis* poses no bar to a decision overruling *Richardson*.

CONCLUSION

For the reasons set forth above, the Court should reverse the decision of the Ninth Circuit and overrule *Richardson v. McKnight*, 521 U.S. 399 (1997).

Respectfully submitted,

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CURIAE
BRIEF

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AND

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In the
Supreme Court of the United States

STEVE A. FILARSKY,

Petitioner,

v.

NICHOLAS B. DELIA,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF FOR THE STATE OF KANSAS AND OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a "private" outside lawyer who performs government functions for a state or local government is entitled to the same immunity—absolute or qualified—that a government lawyer would have if sued under 42 U.S.C. § 1983 for performing the same functions?

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INTEREST OF THE *AMICI* STATES

All States periodically retain outside legal counsel for a variety of reasons and in a variety of settings. Sometimes an Attorney General may retain outside counsel for fiscal reasons or because of staffing and resource limitations. Sometimes an Attorney General may retain outside counsel because of the specialized area of law involved in a particular matter. And sometimes an Attorney General may retain outside counsel because of conflict-of-interest concerns with regard to government lawyers in a particular matter.

Thus, the States have very direct interests in the important legal question whether private outside counsel who perform state government functions may claim the same immunity that would be available to a government lawyer in the same circumstances.

STATEMENT

1. The petitioner, attorney Steve A. Filarsky, was "retained by the City" to assist with "the internal affairs investigation" of a firefighter, Respondent Nicholas B. Delia. *Delia v. City of Rialto, et al.*, 621 F.3d 1069, 1072 (9th Cir. 2010) (reprinted in the Appendix to the Petition, hereinafter "Pet. App."). The sum total of Filarsky's involvement in this case was to conduct an interview with Delia (with other City officials and Delia's lawyer present), question Delia about the matter under investigation, orally direct that Delia go to his house and bring outside materials relevant to the dispute, and consult with the City fire chief who ultimately issued Delia a written order requesting that he go to his home and bring outside

certain materials for inspection by fire department officials. Pet. App. 6-8.

There is no indication in the record that any of these actions were not within the realm of legal advice and assistance, or that the same actions could not have been performed by a government lawyer who undoubtedly would have been able to claim qualified immunity with regard to such actions. The District Court initially indicated that Filarsky's actions did not violate any of Delia's rights, Pet. App. 9, and then in a written order concluded that Filarsky was entitled to qualified immunity. *Id.* at 10-11.

2. The Ninth Circuit reversed the qualified immunity holding. The court first observed that "Filarsky is not an employee of the City. Instead, he is a private attorney, who was retained by the City to participate in internal affairs investigations." Pet. App. 24. The court acknowledged that in *Cullinan v. Abramson*, 128 F.3d 301 (6th Cir. 1997), the Sixth Circuit recognized qualified immunity for a private law firm that a city had retained. Pet. App. at 25. The Ninth Circuit characterized the Sixth Circuit as relying "exclusively on dictum in *Richardson v. McKnight*, 521 U.S. 399, 407 (1997), that 'the common law did provide a kind of immunity for certain private defendants, such as doctors or lawyers who performed services at the behest of the sovereign.'" Pet. App. at 25 (internal quotations and emphasis omitted).

The Ninth Circuit, however, opined that it was "not free to follow the *Cullinan* decision" because "[i]n *Gonzalez v. Spencer*, 336 F.3d 832 (9th Cir. 2003), another panel of this court held that a private attorney representing a county was not entitled to qualified immunity." Pet. App. at 25-26. *Gonzalez* reasoned that a private attorney was not entitled to qualified immunity because she was "a private party, not a government employee, and she ha[d] pointed to 'no special reasons significantly favoring an extension of governmental immunity' to private parties in her position." Pet. App. at 26 (citations omitted). The Ninth Circuit concluded that "we are bound by the *Gonzalez* decision. Accordingly, Filarsky is not entitled to qualified immunity as a private attorney . . . ." *Id.* at 27.

INTRODUCTION AND SUMMARY OF ARGUMENT

To the best of the States' knowledge, *all* States permit the retention of outside counsel by the Attorney General, the Governor, or other state officials or entities, in at least some circumstances. Many States expressly authorize the retention of outside counsel by statute.[1]

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[1] *See, e.g.*, Ariz. Rev. Stat. § 41-191(C) ("The attorney general may also, within the limits of appropriations made therefor, employ attorneys for particular cases upon a fixed fee basis ...."); Ark. Code Ann. § 25-16-702(b)(2) ("If, in the opinion of the Attorney General, it shall at any time be necessary to employ special counsel to prosecute any suit brought on behalf of the state or to defend a suit brought against any official, board, commission, or agency of the State, the Attorney General, with the approval of the Governor, may employ special counsel"); 29 Del. Code § 2507 ("special counsel may be employed . . . with the approval of the Attorney General and the Governor"); Ga. Code Ann. §45-15-4 ("The Attorney General . . . is authorized to select and employ private counsel to perform legal services for" state agencies and officials); Haw. Rev. Stat. § 28-8 ("The attorney general may appoint and, by contract retain the services of special deputies to

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perform such duties and exercise such powers as the attorney general may specify"); Idaho Code § 67-1406(3) ("Whenever the attorney general determines that it is necessary or appropriate in the public interest, the attorney general may authorize contracts for legal services"); Kan. Stat. Ann. §75-710 (Attorney General "shall appoint such assistants ... as shall be authorized by law"); Ky. Rev. Stat. § 12.210 ("The Governor, or any department with the approval of the Governor, may employ and fix the terms of employment and the compensation to be paid to an attorney or attorneys for legal services to be performed for the Governor or for such department"); Md. Code Ann. § 6-105(b)(1) ("the Attorney General, with the written approval of the Governor, may employ any assistant counsel that the Attorney General considers necessary to carry out any duty of the Office in an extraordinary or unforeseen case"); Miss. Code Ann. § 7-5-7 ("The attorney general is hereby authorized and empowered to appoint and employ special counsel, or a fee or salary basis, to assist the attorney general in the preparation for, prosecution, or defense of any litigation in the state or federal courts or before any federal commission or agency in which the state is a party or has an interest"); Neb. Rev. Stat. § 84-203 (Attorney General "may employ counsel" to prosecute or defend suits); N.M.S.A. § 8-5-4 ("special legal assistance, may be employed by the attorney general, under his direction and control, at a reasonable compensation, in any pending action or proceeding to protect the interest of the state"); N.D. Cent. Code § 54-12-08 (Attorney General "may appoint assistant or special assistant attorneys general to represent" the State); Nev. Rev. Stat. Ann. § 41.03435 ("The attorney general may employ special counsel . . . if the attorney general determines at any time prior to trial that it is impracticable, uneconomical or could constitute a conflict of interest for the legal service to be rendered by the attorney general or a deputy attorney general"); N.H. Rev. Stat. § 7:12.I. ("With the approval of the joint legislative fiscal committee and the governor and council, the attorney general may employ counsel, attorneys, detectives, experts, accountants and other assistants in cases of reasonable necessity"); N.C. Gen. Stat. § 147-17(b) ("Whenever the Attorney General shall advise the Governor that it is impracticable for him to render legal services to any State agency, officer, institution, commission, bureau or

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other organized activity, or to defend a State employee or former employee . . ., the Governor may authorize the employment of such counsel, as in his judgment, should be employed to render such services"); Ohio Rev. Code Ann. § 109.07 ("the attorney general may appoint special counsel to represent the state in civil actions, criminal prosecutions, or other proceedings in which the state is a party or directly interested"); 74 Okla. Stat. § 20i.A.3. ("If the Attorney General is unable to represent the agency or official due to a conflict of interest, or the Office of the Attorney General is unable or lacks the personnel or expertise to provide the specific representation required by such agency or official, [the Attorney General may contract] with a private attorney or attorneys"); Ore. Rev. Stat. § 180.140(5) ("Special legal assistants or private counsel may be employed by the Attorney General, under the direction and control of the Attorney General, in particular cases or proceedings, whenever the Attorney General deems it appropriate to protect the interests of the state"); R.I. Gen. Laws § 42-9-I.(b) ("The attorney general shall appoint such special assistant attorneys general as may from time to time be necessary"); S.D. Cod. Laws § 1-11-5 ("The attorney general is also authorized to appoint assistant attorneys general as he may deem necessary on a part-time basis for special assignments"); Tenn. Code Ann. § 8-6-106 ("In all cases where the interest of the state requires . . . the governor shall employ such counsel"); Tex. Gen. Approp. Act, 82nd Leg., R.S., ch. 1355, art. IX, 16.01(a)(3), 2011 Tex. Gen. Laws 4025, 4878-80 ("If the Attorney General determines that outside legal counsel is in the best interest of the State, the Attorney General shall so certify to the Comptroller and to the requesting state governmental entity which may then utilize appropriated funds to retain outside legal counsel"); 3 Vt. Stat. Ann. § 153(c) ("The attorney general may appoint such . . . special assistant attorneys general as may be necessary for the proper and efficient performance of his department"). Va. Code Ann. §§ 2.2-507(C) and 2.2-510(2) ("In cases of legal services in civil matters to be performed for the Commonwealth, where it is impracticable or uneconomical for the Attorney General to render such service, he may employ special counsel whose compensation shall be paid out of the appropriation for the Attorney General's office").

In some states, the power to employ such counsel is implicit or assumed in statutes that provide procedures for or limitations on such appointments.[2]

In actual practice, it is common for Attorneys General to employ outside legal counsel, and to do so both on a regular basis and in a variety of settings, including because the Attorney General's office needs specialized legal assistance, lacks the attorney resources to handle particular matters, or a situation involves conflict-of-interest concerns. Furthermore, there are certainly numerous examples of the States receiving such legal assistance from outside counsel at discounted rates or even on a pro bono basis, with outside counsel recognizing that such work is at least in part a public service.

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[2] *See, e.g.*, *Alaska v. Breeze*, 873 P.2d 627 (Alaska Ct. App. 1994) (Attorney General had authority to appoint special prosecutor to remedy a perceived conflict of interest); Alaska Stat. § 36.30.015(d) (the attorney general must "maintain appropriate supervision, direction, and control" over the outside counsel he appoints); Cal. Code Ann. Tit. 2 § 12520 ("Restriction on employment of special counsel"); Ind. Code Ann. § 4-6-5-3 (No agency "shall have any right to name, appoint, employ, or hire any attorney or special or general counsel . . . without the written consent of the attorney general"); 5 Maine Rev. Stat. § 191.3.B. ("In all instances where the Legislature has authorized an office or an agency of the State to employ private counsel, the Attorney General's written approval is required as a condition precedent to the employment"); Utah Code Ann. § 67-5-5 ("Unless he hires such legal counsel from outside his office, the attorney general shall remain the sole legal counsel for that agency"); Wash. Rev. Code § 43.10.067 (No state official "other than the attorney general, shall employ, appoint, or retain in employment any attorney for" state agencies or officials for the "performance of any of the duties specified by law to be performed by the attorney general").

A. The Court repeatedly has decided what immunity to accord a Section 1983 defendant by considering the function in which the defendant was engaged, not the person's status or title. In fact, except in the context of the private prison guards in *Richardson v. McKnight*, 521 U.S. 399 (1997), the functional analysis has always been a primary inquiry in the Court's immunity cases. *See id.* at 418 (Scalia, J., dissenting) (quoting and citing at least seven decisions of the Court employing such an analysis). A functional analysis has the advantage of drawing relatively clear lines based on conduct, rather than official title, or lack thereof. Furthermore, a functional approach avoids the ironic result that in a Section 1983 suit like this one the *only* defendant left holding the liability bag is the *private* lawyer because all of the government actors—the very people Section 1983 was enacted to reach—have immunity.

B. Private outside counsel function as government lawyers when they represent the States and their officials. They are distinguishable from the private prison guards in *Richardson v. McKnight* for at least four reasons. First, such lawyers are directed by, supervised by, report to, and answer to the Attorney General's office or other government clients. Outside lawyers generally work very closely with and are in constant contact with the Attorney General's office. Second, outside lawyers owe professional, ethical, and fiduciary obligations to their state clients, duties that prison guards simply never bear. Outside lawyers, as a matter of law and ethics, must serve their state clients' interests, and only those interests. Third, outside counsel do with some frequency work for the States at below-market rates, or even on a *pro bono* basis. And, finally, outside counsel who perform government functions generally conduct themselves precisely as they would if they were in fact government lawyers. For all of these reasons, the outside counsel the States retained are in all respects but title "government lawyers."

C. According immunity to private outside counsel performing government functions serves the purposes of immunity in Section 1983 cases by ensuring that such lawyers can provide representation and give advice without fear of personal liability and harassing litigation. Failing to accord private outside counsel such immunity likely will result in decreasing both the quantity and quality of legal assistance currently provided to the States by such lawyers. Providing no immunity to outside counsel necessarily will increase costs to the States, either by virtue of the higher rates that outside counsel will charge, or through new liability imposed on the States if they have to indemnify outside counsel in the event those private lawyers are sued for their work with the States. Furthermore, some outside counsel may well decide that the increased risk, or increased cost of malpractice insurance, is not worth the rewards when it comes to representing the States and their officials. Thus, some private counsel may effectively remove themselves from the pool of attorneys available to the States for outside legal assistance.

ARGUMENT

Outside Counsel Retained By The States Should Be Accorded The Same Immunity That Would Be Available To A Government Lawyer In The Same Circumstances.

A. As A General Rule, The Court Has Determined A Person's Immunity In Section 1983 Suits On The Basis Of Function, Not Status.

Although "Section 1983 'creates a species of tort liability that on its face admits of no immunities,'" *Wyatt v. Cole*, 504 U.S. 158, 163 (1992) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)), the Court long has recognized either absolute or qualified immunity for a variety of governmental functions. In particular, the Court's cases consistently have held "that immunity analysis rests on functional categories, not on the status of the defendant." *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983). Thus, for example, a judge who has absolute immunity for judicial functions, *Stump v. Sparkman*, 435 U.S. 349 (1978), only has qualified immunity for administrative functions. *Forrester v. White*, 484 U.S. 219, 224 (1988). Similarly, a prosecutor who has absolute immunity for prosecutorial functions, *Imbler*, only has qualified immunity for investigative functions. *Burns v. Reed*, 500 U.S. 478, 489-90 (1991); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993). And a police officer who typically has qualified immunity for law enforcement functions, *Anderson v. Creighton*, 483 U.S. 635 (1986), receives absolute immunity for testifying in a judicial proceeding. *Briscoe*, 460 U.S. 325.

Nor has the function analysis been limited to government officials claiming immunity. Instead, private citizens serving as grand jurors have absolute immunity because of their function in the judicial process. *Imbler*, 424 U.S. at 423 n.20. Similarly, any witness who testifies in a judicial proceeding, whether a government official or a private citizen, has absolute immunity. *Briscoe*, 460 U.S. at 335. And four Justices indicated that it is "highly unlikely that we would deny prosecutorial immunity to those private attorneys increasingly employed by various jurisdictions in this country to conduct high-visibility criminal prosecutions." *Richardson v. McKnight*, 521 U.S. 399, 418 (1997) (Scalia, J., dissenting, joined by Chief Justice Rehnquist, and Justices Kennedy and Thomas).

A functional approach to immunity questions has the advantage of creating relatively clear lines which in turn decreases uncertainty and avoids unnecessary litigation over immunities. "It must be remembered that unlike the common-law judges whose doctrines we adopt, we are devising limitations to a remedial statute, enacted by Congress," *Wyatt*, 504 U.S. at 171 (Kennedy, J., concurring), and thus this Court has some discretion in formulating the immunities accorded defendants in Section 1983 suits. The Court's discretion in this context should be exercised to achieve clarity and consistency. Those goals both counsel in favor of adhering to the Court's traditional reliance on a functional approach to immunity. Providing outside counsel performing government functions with the same immunity that would be accorded a government lawyer in the same circumstances is consistent with the Court's traditional "function" approach to immunity issues.

Otherwise, there is an irony to the situation in which lawyers like Filarsky find themselves to be the *only* defendant in a Section 1983 suit with no immunity. In essence, private outside counsel may be left holding the bag, while every government defendant is protected by immunity. Chief Justice Rehnquist described the irony of such a result: "Our § 1983 jurisprudence has gone very far afield indeed, when it subjects private parties to greater risk than their public counterparts, despite the fact that § 1983's historic purpose was 'to prevent *state officials* from using the cloak of their authority under state law to violate rights protected against state infringement.'" *Wyatt*, 504 U.S. at 180 (Rehnquist, C.J., dissenting, joined by Justices Souter and Thomas) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 948 (1982) (Powell, J., dissenting)).

At bottom, the functional approach would accord all those involved in the legal representation of state and local governments the same level of immunity based on their actual conduct, not their status as a government employee or outside counsel. As explained in the next section, that result makes complete sense in the context presented here.

B. Private Outside Counsel Providing Legal Assistance To The States Function As Government Lawyers; Their Situation Is Distinguishable From That Of Private Prison Guards.

Private outside counsel are distinguishable from the private prison guards the Court addressed in *Richardson v. McKnight*, 521 U.S. 399 (1997), in at least four respects. For these reasons, even if the Court did not adhere to a functional analysis, it should reverse the Ninth Circuit's decision.

First, private outside counsel work closely with government lawyers and government officials, report to government lawyers, and are supervised and directed in significant respects by government lawyers. Unlike the private prison guards in *Richardson*, private outside counsel in a very real sense effectively *are* government lawyers. The prison guards in *Richardson* did not report to government prison officials and were not directly supervised by government officials.

Private outside counsel, to the contrary, necessarily and by law in many States have to report to, consult with, and be directed by government lawyers.[3] Even absent such an express statutory provision, supervision and control by government lawyers is the reality for private outside counsel. Indeed, the States and their officials necessarily work closely with outside counsel because government ultimately is responsible for the results.

Second, unlike prison guards, lawyers owe professional and ethical duties to their clients. *Restatement (Third) of the Law Governing Lawyers* § 16 (2000) (a lawyer "must" "proceed in a manner reasonably calculated to advance a client's lawful objectives," "comply with obligations concerning the client's confidences and property, [and] avoid impermissible conflicting interests"). Unlike prison guards, lawyers can be sued for professional malpractice. *Id.*, § 48 ("Professional Negligence—Elements and Defenses Generally"). Moreover, lawyers owe fiduciary duties to their clients, including government clients. *Id.* § 49 ("a lawyer is civilly liable to a client if the lawyer breaches a fiduciary duty to the client"); *see also id.*, Comment b. (listing fiduciary duties that a lawyer owes a client); *id.*, § 74 (attorney-client privilege generally applies when government is the client).

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[3] *See, e.g.*, Idaho Code § 67-1409(2) ("The performance of all contracts for legal services shall be monitored and supervised by the attorney general or his designee"); Md. Code Ann. § 6-105(e)(2) (a "special attorney . . . shall perform the assigned duty, subject to the control of the Attorney General").

Thus, outside counsel owe duties to their government clients of a nature both different and greater than any "duty" a prison guard may owe to potentially hundreds of prison inmates or indirectly to the government that hired the company that employs the private prison guard. Indeed, outside counsel owe a duty to their government clients to further the government's interests, not the lawyer's interests, or the interests of any private clients the lawyer also might be representing. There is no apparent difference between the duties outside counsel owe a government in providing legal assistance, and the duties that a government lawyer owes that same government.[4]

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[4] Indeed, private outside counsel regularly appear before this Court representing the States and their officials. Current and recent examples include the following cases: ***Florida v. U.S. Dept. of Health and Human Services***, No. 11-400 (Paul Clement representing 26 States); ***PPL Montana LLC v. Montana***, No. 10-218 (Greg Garre representing Montana); ***Sorrell v. IMS Health, Inc.***, No. 10-799 (David Frederick co-counsel with the Vermont Attorney General's office); ***Brown v. Plata***, No. 09-1233 (Carter Phillips representing California and its officials); ***South Carolina***

Third, it is the lawyer's ethical, professional, and fiduciary obligations to the client that drive the lawyer's representation of government entities and distinguish outside counsel from private prison guards. Although many outside counsel assisting government are paid for their services, some charge the States below-market rates, and their total fees may be capped, either by state law or by agreement. Furthermore, in a number of situations, private lawyers have provided and will provide *pro bono* assistance to the States and state officials. E.g., *State ex rel. Morrison v. Sebelius*, 179 P.3d 366 (Kan. 2008) (private law firm represented Governor *pro bono*).

The States are not suggesting that private lawyers who serve the States have no interest in compensation. But outside counsel who serve the States often are not driven by the same profit-motive that may well drive private companies operating prisons under a state contract. The very concept of the law as a profession is premised on the notion that the practice of law is not just another profit-making enterprise.

Finally, in very real and material respects, private outside counsel function precisely as government lawyers. Sometimes this fact is recognized formally with designations such as "special assistant attorney

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v. North Carolina, No. 138 Orig. (David Frederick representing South Carolina); *Perdue v. Kenny A.*, No. 08-970 (Mark Cohen representing Georgia); *Alabama v. North Carolina*, No. 132 Orig. (Carter Phillips and Walter Dellinger representing Alabama and North Carolina, respectively).

general" or "special prosecutor."[5] The presence or absence of such a title, however, should not determine whether outside counsel are entitled to immunity. Rather, the facts that outside counsel are performing government functions and are doing precisely what they would do if the States actually employed them is what warrants according outside counsel the same immunity as a state government lawyer in the same circumstances.

Lawyer Filarsky's actions in this case demonstrate the point. There is not one fact in the reported decisions below that shows Filarsky doing anything that he would not or could not have done had the City actually employed him rather than retained him as outside counsel. Filarsky interviewed the subject of the internal affairs investigation, consulted with fire department officials, and provided the subject with a written order from the fire chief. Had Filarsky been a City employee, he could have and almost certainly would have taken exactly the same actions. For purposes of the internal affairs investigation, Filarsky was *the City's lawyer*, plain and simple. That is generally the case with outside counsel working for government.

Thus, for all of the preceding reasons, it is not surprising that in *Richardson v. McKnight* the Court strongly suggested a difference between private lawyers and private prison guards for immunity purposes: "Apparently the law *did* provide a kind of immunity for certain private defendants, such as . . . lawyers who performed services at the behest of the sovereign." 521 U.S. at 407 (emphasis original). In this case, the Court should make clear that it meant what it said in *Richardson* about private lawyers, for all of the reasons discussed above. Applying the traditional and straightforward functional approach, as well as recognizing the role and duties of lawyers, the Court should hold that private outside counsel receive the same immunity that would be accorded to a government lawyer in the same circumstances.

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[5] *E.g.*, *Montana v. Wyoming*, No. 137 Orig. (John Draper, co-counsel on Exceptions to the Special Master's Report, listed as "Special Assistant Attorney General")

C. According Immunity To Private Outside Counsel Serves The Purposes Of Immunity In Section 1983 Cases And Will Avoid Deleterious Effects On The Quantity And Quality Of Legal Assistance Available To The States.

Importantly, according private outside counsel the same immunity for performing government functions as government lawyers performing those same functions furthers the purposes of immunity in the Section 1983 context. When the States hire outside counsel, the States want those attorneys to behave as government lawyers would in vigorously representing the States' interests. The States want private outside counsel to fulfill their duties to their state clients without "fear of personal monetary liability and harassing litigation." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). Such fears are very real if private outside counsel have no immunity, and would have negative consequences for both the quality and the quantity of representation the States receive.

Indeed, a holding that outside counsel can never have immunity in Section 1983 suits will adversely affect the operation of state governments in general, and Attorneys General offices in particular. If there is no immunity for private outside counsel, the cost of hiring and utilizing such counsel necessarily will rise. Private attorneys cannot be expected to assume the risk of a lengthy section 1983 suit without reflecting that risk in the rates they charge.

In fact, in some situations, if a private attorney has no immunity, that attorney effectively assumes *all* of the risk, as the facts of this case demonstrate. In situations like the present one, no other actor involved in the situation lacks any and all immunity. At a minimum, private outside counsel will have to insure themselves against the risk, and that will result in higher rates charged to government.

Another readily apparent example of a private attorney assuming all of the risk would be when outside counsel is hired to prosecute a particular criminal case. In that circumstance, the private attorney might sit in the courtroom beside government employees who are prosecutors and conduct the case precisely as the government prosecutors do, but if outside counsel has no immunity, the private attorney—and only the private attorney—is at risk of facing a section 1983 suit. The government-employee prosecutors will have absolute immunity for their prosecutorial actions. *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Burns v. Reed*, 500 U.S. 478 (1991); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993); *Kalina v. Fletcher*, 522 U.S. 118 (1997); *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009). In the past, four Justices indicated that it is "highly unlikely that we would deny prosecutorial immunity to those private attorneys increasingly employed by various jurisdictions in this country to conduct high-visibility criminal prosecutions." *Richardson v. McKnight*, 521 U.S. 399, 418 (1997) (Scalia, J., dissenting, joined by The Chief Justice, Justice Kennedy and Justice Thomas).

Nor is there any defensible line to be drawn between outside counsel hired to participate in a criminal prosecution, and outside counsel retained to perform innumerable other government functions. Prosecutorial functions may receive absolute immunity, but all government lawyer functions generally receive at least qualified immunity. Thus, even if prosecutorial immunity would not apply in many situations involving private outside counsel, qualified immunity would apply, as Filarsky argued in this case. The purposes of immunity would be furthered if outside counsel performing government functions receive the same immunity as government lawyers performing the same functions, whether that function is defending the States in civil litigation, providing legal advice in a variety of regulatory settings, or dealing with government personnel matters as occurred in this case.

Even if the government can induce private attorneys to take on the risks (created if such attorneys lack any immunity) by agreeing up front to indemnify private attorneys if and when they are sued under section 1983, that alternative imposes a new financial burden on governments and at most delays the effect on the government treasury. In a case like this, such an indemnity agreement might be a comfort to an attorney in Filarsky's position, but even if the private attorney ultimately is found not to have violated anyone's constitutional rights, the City would end up paying substantial sums for that litigation and the defense of outside counsel. These are costs that the government would not otherwise incur, and even if they are viewed as a tradeoff for otherwise having to pay outside counsel higher rates up front (to reflect their higher risk with no immunity), these are at best costs that the government may delay paying, but will not avoid.

Finally, the possibility of obtaining additional malpractice insurance or entering an indemnity agreement with a government client likely will not be a sufficient substitute for actual immunity, from the perspective of at least some private outside counsel. Having malpractice insurance, or having an agreement that someone else ultimately will pay litigation and liability costs, is not the same as knowing up front that legal immunity generally will protect a private lawyer performing government functions from suit. The immunity, after all, is an "immunity from suit rather than a mere defense to liability." ***Mitchell v. Forsyth***, 472 U.S. 511 (1985). Thus, it is likely that some private counsel who currently do or would provide representation to governments will decline to do so *at all* in a regime where there is no immunity in the event they are sued under § 1983.

*****

Ultimately, the conclusion is inescapable that failing to accord private outside counsel the same immunity that state government lawyers would receive in the same circumstances will result in decreases in both the quantity and the quality of legal assistance available to the States. If outside legal assistance becomes more expensive, state officials may have no choice but to forgo such advice altogether or, at a minimum, reduce their resort to such advice, at least in some circumstances. Moreover, some private counsel may choose to discontinue altogether their work for state and local governments and their officials, understandably not wanting to ever even conceivably have to face the prospect of potentially lengthy and costly § 1983 litigation against them.

For all of these reasons, the private outside counsel the States retain to perform state governmental functions should be accorded the same immunity as state government lawyers who perform those same functions. That result is fully consistent with the Court's long line of immunity cases applying a functional approach. And it is fully consistent with the policy factors the Court has considered in its previous cases involving the immunity claims of private defendants. Private outside counsel who represent governments and government officials are performing essential government functions; their profession and the services they provide are readily distinguishable from the situations of prison guards, *Richardson v. McKnight*, or persons invoking self-help remedies in a business dispute. *Wyatt v. Cole*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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November 21, 2011

AMICUS
CURIAE
BRIEF

AND
BRIEFS

No. 10-1018

In The
Supreme Court of the United States

◆

STEVE A. FILARSKY,

Petitioner,

v.

NICHOLAS B. DELIA,

Respondent.

◆

**On A Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

◆

BRIEF OF *AMICI CURIAE* THE LEAGUE OF CALIFORNIA CITIES AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER STEVE A. FILARSKY

◆

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INTERESTS OF *AMICI CURIAE*[1]

The League of California Cities and the California State Association of Counties, as representatives of local government entities throughout California, have a vital interest in ensuring that cities and counties continue to have the ability to make effective and cost-efficient use of private attorneys in providing legal services and representation to the public. As explained in greater detail below, use of private attorneys on an ad hoc basis similar to the circumstances in this case is commonplace, desirable, and sometimes necessary—for smaller cities and counties in particular, but even for larger ones. The availability of qualified immunity for these attorneys is thus vitally important to these local government units.

The League of California Cities (League) is an association of 469 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities and identifies those cases that are of statewide—or nationwide—significance. The Committee has identified this case as being of such significance.

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[1] The parties have consented to the filing of this brief, and their consents have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

The California State Association of Counties (CSAC) is a non-profit corporation with membership consisting of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the State. The Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

◆

SUMMARY OF ARGUMENT

In this section 1983 action, the Ninth Circuit Court of Appeals' published opinion (Opinion) concludes that a city firefighter's Fourth Amendment rights were violated during an internal affairs investigation. Recognizing, however, that there was no clearly established authority that the investigating conduct would constitute a Fourth Amendment violation, the Opinion holds that all the individuals involved in conducting the investigation are entitled to qualified immunity—that is, all except one.

The one participant the Opinion concludes is not entitled to qualified immunity is a private attorney—petitioner Steve A. Filarsky—whom the City of Rialto employed to assist it in conducting the investigation. While noting an express conflict with the Sixth Circuit's opinion in *Cullinan v. Abramson*, 128 F.3d 301, 310 (6th Cir. 1997), the Ninth Circuit panel reasoned it was bound by an earlier Ninth Circuit precedent holding—with virtually no reasoning—that private attorneys hired by government agencies are not entitled to qualified immunity. (Appendix to Petition for a Writ of Certiorari of Steve A. Filarsky (Pet.App.) 25-26 (citing *Gonzalez v. Spencer*, 336 F.3d 832 (9th Cir. 2003) (per curiam)).)

The Court should reverse and hold that Mr. Filarsky is entitled to qualified immunity for the following reasons:

- Local government units, like the City of Rialto in this case, and even federal government agencies commonly engage private attorneys in various capacities in an effort to obtain the most effective legal services and representation possible for the public. The availability of qualified immunity for these private attorneys hired to perform public functions is critical to government agencies' abilities to provide such representation to the public in a fiscally responsible manner.
- This Court's two opinions addressing the availability of qualified immunity to private parties—*Richardson v. McKnight*, 521 U.S. 399 (1997) and *Wyatt v. Cole*, 504 U.S. 158 (1992)—*support* the availability of qualified immunity for private

attorneys hired by cities and counties to perform public functions alongside public officials and employees.

- Flatly denying qualified immunity to private attorneys is not just legally wrong but will harm cities and counties by making use of private attorneys less effective and more expensive. This, in turn, will force many cities and counties to forego the considerable advantages of employing private attorneys or to pay considerably more to do so.

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ARGUMENT

THE COURT SHOULD CLARIFY THAT QUALIFIED IMMUNITY EXTENDS TO PRIVATE ATTORNEYS WHO ARE NOT GOVERNMENT EMPLOYEES BUT ARE HIRED TO PERFORM GOVERNMENT FUNCTIONS ALONGSIDE GOVERNMENT EMPLOYEES—AN ISSUE OF VITAL IMPORTANCE TO CITIES AND COUNTIES.

A. Cities, Counties, And Other Government Units Rely Heavily On Private Attorneys Such As Petitioner Filarsky For Representation And Advice In Performing Government Functions.

"In an era of ever-increasing fiscal consciousness brought on by financial constraints, local government agencies are constantly exploring methods of continuing to provide public services at their traditional level yet, at the same time, reducing if not stabilizing service costs." Philip D. Kahn, *Privatizing Municipal Legal Services*, 10 Local Government Studies, no. 3 (1984) at 1, *available at* http://www.informaworld.com/smpp/content~db=all~content=a789131048. Although this observation was made more than 25 years ago, it is even more apt in the dire financial circumstances most local government agencies face today. Today, as then, one common means for cities and counties to meet their needs for legal services in a cost-effective and fiscally responsible manner is to hire private attorneys either to provide specific services on an ad hoc basis or to serve as city attorney or county counsel.

As in this case, cities frequently utilize private attorneys on an ad hoc basis for a variety of purposes, including "litigation matters, criminal prosecution, special appearances before other government agencies, extensive research projects, preparation of contracts and agreements other than those routinely used by the city in the ordinary course of business, and other projects of an unusual or time consuming nature." *Id.* at 3. And hundreds of cities in California contract out the position of city attorney to a private attorney or law firm. *See id.* at 2 (in 1984, "[i]nformation maintained by the League of California Cities indicate[d] that out of 435 member cities surveyed, 340 of them—approximately 78 per cent—ha[d] contract city attorneys").

Cities are not the only government units that frequently utilize private attorneys. The vast majority of California counties use private outside counsel in situations like the one in this case. In most counties, outside counsel are brought in for the investigation of high level personnel issues, where the facts are particularly complicated, or where there are conflicts of interest. Some counties bring in outside counsel routinely.

Private attorneys are similarly hired by "other local government agencies such as water districts, school districts, [and] redevelopment agencies[.]" *Id.* at 2 & n.8. Federal government agencies too use private counsel on an ad hoc basis for litigation and various other purposes. *See* William V. Luneburg, *Contracting by the Federal Government for Legal Services: A Legal and Empirical Analysis*, 63 Notre Dame L. Rev. 399, 463 (1988) (surveying various federal departments and agencies and concluding that "legal work of all types, from the purely advisory to litigation, is contracted out").

"The first and most obvious potential advantage of outsourcing legal services is cost savings." Patrick McFadden, Note, *The First Thing We Do, Let's Outsource All the Lawyers: An Essay*, 33 Pub. Cont. L.J. 443, 444 (2004). "Although substantially similar from a functional stand-point, in-house and contract city attorneys differ primarily with regard to financial considerations." Kahn, *supra*, at 2. Using private attorneys rather than in-house staff provides substantial savings to government entities on a myriad of expenses, from employee benefits to law libraries to various administrative overhead costs. *Id.* "The economies associated with a contract city attorney are particularly evident in the case of cities whose legal needs are insufficient to warrant the full-time permanent employment of one or more attorneys; however, even cities with substantial legal needs nonetheless still benefit from contracting out some or all city attorney services (and the attendant administrative overhead) to the private sector." *Id.*

Saving costs is not the only reason cities, counties, and other government units hire private attorneys. *See* McFadden, *supra*, at 453 (summarizing "the possible benefits of outsourcing legal work in terms of cost savings, improved service, and more pragmatic decision making"). "Value includes not only the absolute cost, but also the quality of service. At its most basic level, the decision to outsource government attorneys is not so different from the 'make-or-buy' decision that corporations face with respect to the size of their in-house legal departments." *Id.* at 444-45; *see also id.* at 445 & n.8 (noting, in context of private firm outsourcing of legal services, advantage of outside firms' exposure to new legal issues and developments).

Specifically, other pragmatic and beneficial reasons for cities and counties to employ private outside counsel include:

- limitations on in-house staff resources and time to do the necessary work—many smaller cities and counties simply lack the legal staff to complete even relatively small tasks, and even larger ones may lack sufficient legal staff for especially large tasks, *see* Kahn, *supra*, at 2 (noting that some cities are so small that their legal needs do not warrant full-time employment of even one attorney); *see also* Luneburg, *supra*, at 405, 463 (noting these limitations in corporate context and that same considerations apply to federal agencies), 459 (noting that "[t]he FDIC explains its use of private attorneys largely as a matter of lack of staff resources to handle the volume of work");

- to avoid actual or potential conflict-of-interest issues, *see, e.g.*, *Morongo Band of Mission Indians v. State Water Resources Control Bd.*, 45 Cal. 4th 731, 737-42, 88 Cal. Rptr. 3d 610, 199 P.3d 1142 (2009) (discussing conflict-of-interest issues arising where agency attorney acts as both advocate before and advisor to an agency); and, relatedly,
- "a particular need for 'independence' in the rendering of the opinion or as a check on an opinion rendered internally in an area where the inside lawyer may have less experience than outside counsel and some 'comfort' might be obtained by confirmation of the inside view," Luneburg, *supra*, at 405; *see also id.* at 463 (noting that this consideration, arising in

> corporate context, also applies to federal agencies).

Public entities frequently employ private counsel when there is a need for specialized expertise that in-house attorneys for a city or other government unit—small or large—may lack. "Private attorneys with significant, specialized expertise in various sectors can provide improved service to government agencies." McFadden, *supra*, at 445; *see also* Luneburg, *supra*, at 405 (noting "lack of in-house expertise" as reason to outsource legal work), 463 (noting that this consideration, arising in corporate context, also applies to federal agencies), 459 (noting that the FSLIC's contracting is required for both lack of staff resources and need for expertise in areas of local law).

This case well illustrates these concepts. The City of Rialto is a relatively small city that does not employ an in-house city attorney but hires outside counsel for legal services. Additionally, like other cities small and large, the City of Rialto sometimes needs to hire private counsel on an ad hoc basis and to hire counsel with specialized knowledge in areas such as labor law. Mr. Filarsky, a private attorney, had served as an independent outside counsel for the City over a period of more than a decade, "to participate in internal affairs investigations concerning personnel issues," to conduct interviews of City employees "in connection with the investigative process of the City's personnel/internal affairs matters," and to provide legal advice to the City in connection with disciplinary proceedings. (Pet.App. 88-89, ¶¶ 3-4; *see also* Pet.App. 6-7 ("Filarsky had previously represented the City in conducting interviews during internal affairs investigations."); Pet.App. 44-45, ¶ 4 ("At the time of the interview, Filarsky had for a number of years been regularly representing the City and providing legal advice to it regarding labor and employment issues" and "had previously questioned Fire Department employees in internal affairs investigations.").)

In short, use of private attorneys—as exemplified by the City of Rialto's employment of Mr. Filarsky—is a common and vital component of municipal, county, and other forms of local governance, including the federal government. Given the prevalence of section 1983 actions, the issue of whether private attorneys hired by cities and counties enjoy qualified immunity has the potential to significantly impact each of the League's 469 members and CSAC's 58 members—not to mention cities, counties and other local government units nationwide—and perhaps even federal government agencies in the context of *Bivens* actions.[2]

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[2] *See Anderson v. Creighton*, 483 U.S. 635, 637 (1987) (discussing qualified immunity of federal agents in context of Fourth Amendment action for money damages under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)); *see also Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 65 (2001) (leaving open the question "whether a *Bivens* action might lie against a private individual"); *Pollard v. GEO Group, Inc.*, 629 F.3d 843, 846 (9th Cir. 2010) (explaining that panel majority "grants a *Bivens* claim to a prisoner against private company prison guards who are unprotected by notions of qualified immunity, available only to government employees") (Bea, J., dissenting from denial of rehearing en banc) (footnote omitted), *cert.*

(Continued on following page)

B. Private Attorneys Such As Mr. Filarsky—Who Are Hired By And Work With Government Officials And Employees To Perform Government Functions—Are Entitled To Qualified Immunity Even Though They Are Not Public Employees.

In this case, the Ninth Circuit panel determined that it was bound by the circuit's earlier, per curiam opinion in *Gonzalez*, which held that a private attorney representing the County of Los Angeles was not entitled to qualified immunity. (Pet.App. 25-26, citing *Gonzalez*, 336 F.3d at 834-35.) The entire reasoning of *Gonzalez* for rejecting the private attorney's claim of qualified immunity was that (1) she was "a private party, not a government employee," and (2) she pointed to "'no special reasons significantly favoring an extension of governmental immunity' to private parties in her position." 336 F.3d at 835 (quoting *Richardson*, 521 U.S. at 412). However, the result in *Gonzalez*, and now in this case, actually contravenes this Court's two opinions that address qualified immunity of private parties—*Wyatt* and *Richardson*.

Consistent with those opinions, the Sixth Circuit in *Cullinan* "s[aw] no good reason to hold the city's in-house counsel eligible for qualified immunity and not the city's outside counsel." (Pet.App. 25, quoting *Cullinan*, 128 F.3d at 310.) *Cullinan*'s observation applies with even greater force here. Mr. Filarsky

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granted sub nom. Minneci v. Pollard, 131 S. Ct. 2449 (May 16, 2011) (No. 10-1104).

was hired by the city to assist in an internal affairs investigation—an inherently public function. *See Richardson*, 521 U.S. at 417 (Scalia, J., dissenting) (explaining that the function at issue there—" '[t]he duty of punishing criminals' "—was " 'inherent in the Sovereign power' ") (citation omitted). Attorneys performing such a public function at the request of public officials, " 'while engaged in that duty, stand so far in the place of the State and exercise its political authority, and do not act in any private capacity.' " *Id.* (citation omitted).

1. *Wyatt* and *Richardson* allow for qualified immunity here.

Though *Wyatt* declined to afford qualified immunity to private party defendants, its holding was "precise[ly]" limited to parties "invoking a state replevin, garnishment, or attachment statute" for private purposes, 504 U.S. at 168-69, thus leaving open whether qualified immunity might be available to private parties who performed government functions. Far from invoking state statutes for private purposes like the defendant in *Wyatt*, private attorneys like Mr. Filarsky provide public services at the request of local governments.

Similarly, while *Richardson* declined to provide qualified immunity to prison guards in a private prison setting, it expressly "answered the immunity question narrowly, in the context in which it arose." 521 U.S. at 413. Far removed from a private attorney providing legal services on an ad hoc basis at the request of a government entity, the specific context in *Richardson* was "one in which a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertakes that task for profit and potentially in competition with other firms." *Id.*

Richardson, in fact, points directly to application of qualified immunity here. It distinguished "lawyers who performed services at the behest of the sovereign," *id.* at 407, and emphasized that the case did "not involve a private individual briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision." *Id.* at 413. That description fits Mr. Filarsky's role in this case to a tee. As the Opinion acknowledged, he "is a private attorney, who was retained by the City to participate in internal affairs investigations." (Pet.App. 24.) The Opinion also describes Mr. Filarsky conducting the internal affairs interview in the presence of two fire battalion chiefs, and conferring with the fire chief during a break in the interview. (Pet.App. 6-8.) Thus, Mr. Filarsky, like many private attorneys retained on an ad hoc basis by cities and counties, was not performing anything like the kind of long-term and largely autonomous administrative function addressed in *Richardson*.

2. History favors recognition of qualified immunity here.

As *Richardson* explained, this Court "look[s] both to history and to the 'special policy concerns involved in suing government officials'" in determining whether private defendants enjoy immunity. 521 U.S. at 404 (quoting *Wyatt*, 504 U.S. at 167). In terms of history, *Richardson* points out that "[a]pparently the law *did* provide a kind of immunity for certain private defendants, such as doctors or lawyers who performed at the behest of the sovereign." *Id.* at 407. The Sixth Circuit relied in part on this point in *Richardson* to conclude that a private attorney hired by a municipality was entitled to qualified immunity. *Cullinan*, 128 F.3d at 310; *see also Cooper v. Parrish*, 203 F.3d 937, 952 (6th Cir. 2000) (declining to extend qualified immunity to private attorney prosecuting nuisance abatement actions and distinguishing *Cullinan* on grounds that attorney was not acting at behest of the state and not paid by the state for his services).[3]

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[3] While the Ninth Circuit's opinion in this case dismissed this point as just a dictum in *Richardson* (Pet.App. 25), the point was not mere dictum but was actually part of the *Richardson* majority's express rationale for concluding that history did not support the immunity claim of private prison operators. *Richardson*, 521 U.S. at 407; *see Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66-67 (1996) (contrasting rationale and portions of opinion necessary to reach result with "mere *obiter dicta*").

3. Policy considerations favor qualified immunity here.

More importantly, this Court has "never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law." *Anderson*, 483 U.S. at 645. What is most significant is that the key policy concerns identified by this Court favor allowing, not disallowing, qualified immunity here. As *Richardson* recaps, qualified immunity serves the purposes of:

- "protecting government's ability to perform its traditional functions by providing immunity where necessary to preserve the ability of government officials to serve the public good or to ensure that talented candidates [are] not deterred by the threat of damages suits from entering public service";
- "protecting the public from unwarranted timidity on the part of public officials by, for example, encouraging the vigorous exercise of official authority"; and
- "contributing to principled and fearless decision-making." 521 U.S. at 408 (internal quotation marks and citations omitted).

These purposes are all thwarted by disallowing qualified immunity to private attorneys who are hired by government entities to represent, advise, and work with them on matters of governance and who effectively perform government functions.

Disallowing qualified immunity undoubtedly would discourage some talented private attorneys from performing services for cities, counties, and other government units. The public benefits greatly from cities and counties utilizing talented attorneys with special expertise, but disallowing them qualified immunity solely because they are private will surely act as a disincentive to their doing so. *See Sherman v. Four County Counseling Ctr.*, 987 F.2d 397, 406 (7th Cir. 1993) (explaining that where private entity is "fulfilling a public duty," denying qualified immunity would discourage public service and that "[t]he *Wyatt* Court noted that one purpose of qualified immunity is to avoid discouraging public service") (citing *Wyatt*, 504 U.S. at 168).

And private lawyers who do continue to perform services for cities and other government units will likely exhibit "unwarranted timidity" in government decision making, one of the very pitfalls that qualified immunity is intended to prevent. *Richardson*, 521 U.S. at 408; *see also DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 723 (10th Cir. 1988) ("[D]enying immunity would make contractor defendants—whether individual or corporate—more timid in carrying out their duties and less likely to undertake government service."). The public's ability to procure "vigorous exercise of official authority" and "principled and fearless decision-making" should not turn on whether an attorney representing the public is on the public payroll or instead hired by the public on an ad hoc basis.

And, inevitably, the cost of hiring private lawyers will increase if they are categorically disqualified from receiving qualified immunity in section 1983 lawsuits. Mechanisms such as indemnity and insurance, *see Richardson*, 521 U.S. at 410-11, will not prevent increasing costs. If private attorneys cannot avail themselves of qualified immunity, then the costs to indemnify and insure their services will increase and will ultimately be borne by the government entities that use them. As Justice Scalia pointed out in *Richardson*, there is no "free lunch": "[A]s civil-rights claims increase, the cost of civil-rights insurance increases." *Id.* at 419 n.3 (Scalia, J., dissenting). Denying qualified immunity to private attorneys such as Mr. Filarsky thus directly implicates cities' and other government units' abilities to cost-effectively "serve the public good." *Richardson*, 521 U.S. at 408 (internal quotation marks and citations omitted).

While the majority opinion in *Richardson* opined that competitive market forces would serve some of the same purposes that qualified immunity serves, *id.* at 409, that rationale does not apply here. In *Richardson*, the private prison companies' only potential clients were government units. *See Richardson*, 521 U.S. at 418-19 (Scalia, J., dissenting) (stating that "it is fanciful to speak of the consequences of 'market' pressures in a regime where public officials are the only purchaser"). Here, on the other hand, private attorneys can take their business elsewhere—namely to private clients.

In sum, more than ample policy reasons favor qualified immunity for attorneys, such as Mr. Filarsky, who are hired by city and county officials to work for and with them in representing cities and counties and performing government functions, as demonstrated above. As we now explain, failure to clarify that qualified immunity is available to these private attorneys will harm cities, counties, and other government units that use them.

C. Disallowing Qualified Immunity To Private Attorneys Hired By Cities And Counties Will Hamper Their Abilities To Obtain High-Quality And Cost-Effective Legal Services For The Public.

As explained above, many smaller cities and counties do not have sufficient legal needs or ample enough budgets to employ in-house attorneys, and even larger ones may not be able to afford sufficient in-house legal staff to handle all their legal needs. Moreover, cities and counties of all sizes sometimes require attorneys with specialized skills. If private attorneys who presently work for cities and counties decide to opt out of such service altogether rather than face lawsuits without qualified immunity, this will hamper the ability of small cities and counties, and even larger ones, to obtain the services of talented lawyers with needed expertise in areas of municipal and county governance.

And as the fees charged by experienced private attorneys who do continue to provide vigorous services to cities and counties go up—due to the increased costs that will inevitably follow from the lack of qualified immunity—all cities and counties will be adversely affected. Smaller cities and counties with little or no in-house legal staff will have to pay more for private attorneys or bear the financial burden of hiring in-house counsel. Larger cities and counties that have significant in-house counsel staff will pay more when the need arises for attorneys with specialized expertise or else bear the financial burden of obtaining and maintaining in-house counsel with such expertise.

To keep costs—and thus prices—from increasing, some private attorneys may perform less fearlessly than they would if qualified immunity were available or than attorneys on the public payroll to whom qualified immunity is available. *See Richardson*, 521 U.S. at 419 (Scalia, J., dissenting) (explaining that price will be the "predominating factor" in public entity's choice of contractors and that "fearless" performance entails lawsuits, which increase contractors' costs and thus price). Perhaps less qualified, less experienced, and less talented private attorneys will step forward to offer their services at cheaper rates. Either way, cities and counties will then be getting less value for the money spent on private attorneys.

◆

CONCLUSION

For the foregoing reasons, the court of appeals' judgment should be reversed with directions to grant qualified immunity to petitioner Filarsky. Disallowing qualified immunity will cost cities and counties substantially in terms of both the value and price of legal services. These negative consequences are not even remotely required by this Court's precedent; on the contrary, *Richardson* paves the way for this Court to clarify that qualified immunity is available to private attorneys, such as Mr. Filarsky, who act as adjuncts to government agencies.

Respectfully submitted,

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November 2011

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 10-1018

In the Supreme Court of the United States

STEVE A. FILARSKY,
Petitioner,
v.
NICHOLAS B. DELIA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL SCHOOL BOARDS ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND NATIONAL CONFERENCE OF STATE LEGISLATURES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a lawyer retained to work with government employees in conducting an internal affairs investigation is precluded from asserting qualified immunity solely because of his status as a "private" lawyer rather than a government employee.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[*]

Amici and their members represent just a few of the many state and local government entities that rely heavily upon outside, "private" counsel to assist in performing their public functions.[1] These government entities have a strong and practical interest in ensuring that outside counsel acting on their behalf are not denied the protection of qualified immunity solely because they are not government employees.

Government entities like the cities, counties, and school districts that *amici* represent, are uniquely creatures of law. Like private entities, they must comply with the complex web of regulations that increasingly governs all aspects of modern life. But unlike those private entities, public entities also make and enforce law; protect citizens from those who would break it; and implement policies to ensure its smooth administration. And governments do all of this within the oft-uncertain constraints of the Constitution.

It is notable, then, that government entities so enmeshed with law commonly employ few in-house lawyers—and often none at all. Many factors—

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[*] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici* and their counsel, has made a monetary contribution intended to fund the preparation or submission of this brief. See Rule 37.6.

[1] A short description of each *amicus curiae* is set forth in the Appendix.

including scarce resources, small-scale staffs, and the need for specialized legal expertise—conspire to ensure that when local governments and other public entities need lawyers, they must often turn to outside counsel.

And so it is that in communities across the Nation, when a government entity encounters complex legal problems of great public interest—for example, a municipality conducting an investigation into official corruption, or a school district drafting policies for religious displays on campus—these matters are almost certain to be handled by outside lawyers.

There is nothing wrong with this. To the contrary, outside lawyers provide government entities with specialized knowledge and experience otherwise unavailable in-house, and they are able to provide this counsel cost-effectively as needed. The ready availability of skilled outside lawyers is often the surest guarantee that legal obligations will be understood and citizens' rights will be protected.

But there are obstacles to the use of outside lawyers by the government. Skilled lawyers in private practice are in demand; public resources are scarce. And in many jurisdictions, local law prohibits public entities from indemnifying outside counsel. For these reasons, government entities may be less attractive clients for highly qualified outside lawyers.

Depriving those lawyers of qualified immunity aggravates the problem, and indeed threatens government's ability to retain qualified counsel at all. Many of the legal issues for which government entities rely most heavily on outside counsel—such as the internal investigation in this case—are precisely the kind most likely to trigger § 1983 litigation. Without the protection of qualified immunity, lawyers called upon to perform public duties will have their service rewarded with a lawsuit. The result will be to severely chill lawyers' willingness to undertake important work on behalf of the public, with potentially disastrous consequences for the institutions that rely on them.

STATEMENT

1. This case involves a claim under 42 U.S.C. § 1983 by Respondent, a firefighter for the City of Rialto, California, against Petitioner, an attorney retained by the City to assist with its investigation of Respondent.

Respondent has served as a firefighter for the City of Rialto since July 2000. Pet. App. 43. In that capacity, he was promoted to the rank of Engineer, but by June 2006 he was demoted back to firefighter for sending inappropriate emails. *Id.* at 43-44.

Shortly after his demotion, Respondent complained that he felt sick while attending to a toxic spill and remained off work for several weeks. *Id.* at 5-6. Although doctor's letters excused him from work, they placed no other restrictions on his activity. *Ibid.*

The timing of Respondent's illness, hard on the heels of his demotion, raised suspicions within the City and Fire Department. Pet. App. 44. Those suspicions heightened after Respondent was observed buying and loading building supplies, including fiberglass insulation, at a local home improvement store. *Ibid.* The City thus initiated a formal internal affairs investigation to determine whether Respondent was absent from work under "false pretenses." *Ibid.*

2. To conduct that inquiry, the City retained Petitioner Steve Filarsky, an attorney in private practice with significant experience conducting internal investigations. Pet. App. 44. Petitioner had routinely represented the City in labor and employment issues over the course of fourteen years. *Id.* at 44-45, 89. On behalf of the City, Petitioner's function was to conduct the interviews and internal investigation, provide legal advice, propose disciplinary courses of action, and conduct or participate in related legal proceedings. *Id.* at 59.

As part of his investigation, Petitioner interviewed Respondent about his absences. Pet. App. 6-7. Two Fire Battalion Chiefs and Respondent's attorney were also present. *Id.* at 7. The interview focused on Respondent's purchase of building insulation while off work on a sick day. *Id.* Respondent acknowledged his purchase of the materials, but claimed he had undertaken no home-remodeling while out on sick leave and that the materials remained unused at his house. *Ibid.*

Following this statement, Petitioner took a break to confer with the Battalion Chiefs and Fire Chief. Pet. App. 7-8. They decided that the investigation could be concluded without disciplinary action if Respondent could demonstrate that the materials had not been incorporated into his house. *Id.* at 90-91. Petitioner then reconvened the interview and informed Respondent that he would be exonerated if he produced the home improvement materials and showed that they were unused. *Id.* at 91. Respondent, on the advice of his counsel, refused. *Id.* at 8.

Petitioner subsequently consulted with the Fire Chief, who signed an order requiring Respondent to produce the unused materials outside his home. Pet. App. 46-47. The Battalion Chiefs then followed Respondent to his house and watched as he produced a sample of the unused insulation. *Id.* at 47-48. Having verified that the material was unused, the City terminated the investigation, and Respondent was not subjected to any disciplinary action. *Ibid.*

3. Respondent subsequently sued the City, the Fire Department, the Fire Chief, the Battalion Chiefs, ten unnamed individuals, and Petitioner, alleging that the order to produce the building materials was an unconstitutional search under the Fourth Amendment. J.A. 18-25. In his complaint, Respondent alleged that Petitioner was "an official policy-maker for the City" whose actions "represent actions by the municipality itself," and thus occurred under color of state law for purposes of § 1983. J.A. 21, 24.

The district court granted summary judgment, concluding that all defendants—including Petitioner—were entitled to qualified immunity. Pet. App. at 48.

The Ninth Circuit affirmed with respect to all of the government employees. But as to Petitioner, the Ninth Circuit reversed, holding that because "Filarsky is not an employee of the City, he was "not entitled to qualified immunity." *Id.* at 27.

Petitioner thus finds himself alone in a peculiar legal limbo: Because he was acting under color of state law "as an official policy-maker for the City" (J.A. 21), he faces liability for constitutional torts under § 1983. But because he is not directly employed by the City, he is not entitled to the qualified immunity that would protect a government-employee attorney performing exactly the same function.

This Court granted certiorari.

SUMMARY OF ARGUMENT

1. For cities, counties, school districts, and other local government entities, the availability of qualified immunity for all of their lawyers is a matter of great importance. Many of those entities rely exclusively on outside counsel who are not employees; in-house counsel is a luxury they cannot afford at all. And nearly all local government entities depend on outside lawyers to handle specialized, sensitive, and complex legal problems—the very problems most likely to trigger the litigation that qualified immunity protects against. Given the extent of local governments' dependence on outside counsel, denying qualified immunity to those counsel—and thus exposing them to suit for their work on behalf of the public—threatens to severely restrict public entities' access to high-quality legal representation.

2. Under this Court's precedents, all of the government's lawyers—whether they serve in-house or as outside counsel—are entitled to qualified immunity. The Court has indicated that qualified immunity attaches to all persons who perform an "essential government function," and the Court's decisions over many decades demonstrate that "essential" government functions are those that are (a) performed on behalf of the public good, and (b) require the exercise of judgment and discretion. Government lawyers, whatever their formal employment status, frequently

exercise judgment and discretion on behalf of the public interest. To deny the protections of qualified immunity to these lawyers merely because of the technicalities of their employment relationship would elevate form over substance, to the detriment of the public they serve.

ARGUMENT

I. Depriving Government Lawyers Of Qualified Immunity Based On Their Status As Outside Counsel Would Impede Local Governments' Access To Effective Legal Advice And Representation.

Government entities have "long engaged in the practice of contracting with private lawyers to represent public interests." Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U. C. DAVIS L. REV. 411, 415 (2009). As Petitioner's brief ably explains, this country has a rich tradition of public legal work being performed by even the most elite lawyers in private practice—from John Marshall to Daniel Webster. See Pet. Br. 18-19.

But it is not only for matters of great public importance that government entities turn to outside lawyers. In fact, the great majority of those entities do not have full-time in-house counsel at all. Throughout the Nation, thousands of cities, counties, school districts, water and sanitation authorities, and many others rely of necessity on outside counsel for *all* their legal work. And many other government entities, even the most well-funded, depend on the expertise of outside counsel for a wide variety of their day-to-day needs. Depriving those lawyers of qualified immunity threatens to impair the public functions they perform, to make high-quality lawyers scarce at times when they are most needed, and ultimately, to endanger the very individual rights § 1983 aims to protect.

A. Government entities depend heavily—and often exclusively—on the advice and representation of outside lawyers.

For many local government entities, their small size and scarce resources make it impossible to shoulder the expense of employing a full-time in-house counsel. Of necessity, they rely on part-time lawyers and outside firms to provide counsel on a project basis as needed.

For example, fully two-thirds of America's 3,068 counties have fewer than 50,000 people—a population base that typically cannot support even one full-time lawyer. The same goes for thousands of smaller local entities, such as water districts, sanitation authorities, utilities, and redevelopment agencies.

Many of the Nation's 15,000 school districts similarly cannot afford in-house legal departments. Notably, the Council of School Attorneys—a national association of lawyers who represent public schools—has more than 3,000 members, of whom just 355 are employed in-house. And even when a large and relatively wealthy school district can afford to have some lawyers on its staff, it remains heavily dependent on outside lawyers for the bulk of its work.

Take, for example, the school district of Fairfax County, Virginia. With an annual budget of $2 billion, the Fairfax County public school system features some of the Nation's most highly-regarded public schools. But although the Fairfax County Public Schools employ 22,000 people, its legal department consists of just three.[2] By contrast, Google—a corporation with a similar number of employees—boasts an in-house legal team of more than 200.

Although the work of in-house and outside counsel for government entities is often "substantially similar from a functional stand-point," they "differ primarily with regard to financial considerations." Philip D. Kahn, *Privatizing Municipal Legal Services*, 10 Local Gov't Studies (1984), at 2. By contracting out legal services, local governments save on employee benefits, overhead, pensions, and many other costs associated with hiring full-time public employees. And now more than ever, the need for those savings is acute. See Elizabeth McNichol, et al., *States Continue to Feel Recession's Impact*, Center on Budget & Policy Priorities (June 17, 2011) (estimating $103 billion in budget gaps for fiscal year 2012).[3] State and local governments "continue to struggle to find the revenue needed to support critical public services like education, health care, and human services," and relying on cost-effective outside counsel has become a financial imperative. *Ibid.*

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[2] See Fairfax County, Response to Questions on the FY2012 Budget.*available at:* *http://www.fairfaxcounty.gov/dmb/fy2012/budget_questions/bos_q.htm*. *See* No. 42.

[3] Available at http://www.cbpp.org/files/9-8-08sfp.pdf.

B. Even when governments can afford to employ in-house lawyers, they rely on the expertise of outside counsel to serve a wide variety of public functions.

In addition to cost savings, outside counsel also provide a breadth and depth of expertise unavailable to even the largest and wealthiest public entities. Cities, school districts, and other entities face an enormous variety of complex legal challenges. They must defend employment, tort, and civil rights lawsuits; enforce land use, nuisance, tax, condemnation, and other civil ordinances; prosecute criminal violations; navigate employee pension rules; issue bonds and secure financing; negotiate commercial contracts, from construction projects to information technology licensing; and comply with complex regulatory mandates, such as special education requirements for school districts—just to name a few.

It is no wonder, then, that even some of the Nation's largest and wealthiest counties rely predominantly on outside counsel to assist with their many legal needs. See *L.A. County Counsel Annual Litigation Cost Report*,[4] at 2 (Nov. 18, 2010) (noting that $38.1 million of the county's $51.8 million budget went to outside counsel). Yet, complex legal issues arise regardless of the size, wealth, and sophistication of the entities that must deal with them. For example, even small, rural municipalities and school districts routinely face issues related to collective bargaining, Establishment Clause and Free Exercise Clause rights, and compliance with Title IX and the Americans with Disabilities Act—all highly specialized fields of law. A small staff of in-house lawyers can hardly be expected to have skill and expertise in all of these areas. Nor would it be economical to bring many important, but non-routine, matters in-house.

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[4] http://counsel.lacounty.gov/lit_09-10.pdf.

Returning again to the example of Fairfax County, the school district's three-person legal department devotes its time exclusively to "provid[ing] legal services relating to employees and students" in its 194 schools. ***Response to Questions on the FY2012 Budget, supra***. For all other work in "specialized fields," the school district "utilizes outside counsel." *Ibid*. And Fairfax County is hardly unique. The following are just a few examples of the variety of issues on which local governments routinely seek outside counsel:

- The City of Bend, Oregon uses outside counsel to defend lawsuits against the city.[5]
- The City of Gadsden, Alabama relies on outside counsel to pursue misdemeanors and assist with criminal prosecutions.[6]
- The City of Seattle, Washington recently decided, due to "the austere budget climate," to enlist a variety of private lawyers to defend its

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[5] See City of Bend Website, http://www.ci.bend.or.us/depts/administration/city_attorney/index.html.

[6] See City of Gadsden Website, http://www.cityofgadsden.com/Default.asp?ID=12.

police department in wrongful death, misconduct, and civil rights lawsuits.[7]

- In nearby Shoreline, Washington, the city has retained a private law firm for its "expertise and advice" negotiating a contentious redevelopment project.[8]
- The City of Friendswood, Texas contracts with private counsel for general legal advice on zoning, land use, and other issues encountered by its mayor and city council.[9]
- The City of Mountain View, California uses outside counsel to defend and prosecute civil actions.[10]
- To the north, the City of Oakland, California retains outside counsel for a wide variety of transactional and litigation matters that "require specialized expertise," ranging from af-

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[7] Press Release (May 3, 2011), http://www.seattle.gov/law/newsdetail.asp?ID=11692&dept=9.

[8] Press Release, (Sept. 28, 2011), http://www.richmondbeachwa.org/pointwells/documents/City_of_Shoreline_Press_Release_20110928.pdf

[9] City of Friendswood Requests for Proposals (2010), http://old.ci.friendswood.tx.us/Agendas/cc110620%20Regular/CMO%2006-20%20Regular/New%20CA/City_Attorney_RFP.pdf.

[10] See City of Mountain View Website, http://www.ci.mtnview.ca.us/city_hall/attorney/default.asp.

fordable housing development to intellectual property to gang injunctions.[11]

- Meanwhile, to the south, the City of Ojai, California has retained a private lawyer to advise on the acquisition of a water company.[12]
- The City of Henderson, Texas has relied for all matters on an attorney in private practice, who it retained to serve as City Attorney on a contractual basis.[13]

Even well-funded state attorneys general have retained outside law firms for complex or high-profile constitutional litigation. See, *e.g.*, *AG Defends Outside Counsel Decision*, The Topeka Capital-Journal (July 15, 2011) (law firm retained to defend federal lawsuits challenging abortion laws).[14] And, of course, state and local governments have often sought out the very best advocates in private practice to provide high-quality representation before this Court.

Government entities also often rely on outside counsel to handle sensitive internal investigations, like the one at issue in this case. For localities with limited access to in-house counsel, best practices call for investigations of wrongdoing to be handled by outside counsel. See Jonathan D. Greenberg & Heather R. Baldwin Flasuk, *When Public Officials Go Rogue: The Importance of Hiring Outside Counsel to Perform Investigations into Allegations of Employee or Officer Wrongdoing*, Cities & Villages (May/June 2010).[15] This avoids conflicts of interest and ensures public confidence that an investigation is being conducted objectively and taken seriously by public officials. The city council of Sheboygan, Wisconsin, for example, recently retained a former U.S. Attorney in private practice to investigate complaints of public drunkenness and lewd conduct by the city's mayor. See *Sheboygan Retains Counsel to Investigate Complaints Against Mayor*, Wisconsin Law Journal (Sept. 15, 2011)[16]; see also City of Vernon News Release (Feb. 16, 2011) (announcing city's retention of former California Attorney General to serve as independent ethics advisor).[17]

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[11] City of Oakland Request for Qualifications (2011), http://www.oaklandcityattorney.org/PDFS/RFQ%20Outside%20 Counsel%20(F).pdf.

[12] *Citing Water Issue, Council Retains Attorney*, Ojai Valley News Blog (Nov. 10, 2011), http://ovnblog.com/?p=5313.

[13] http://www.tml.org/legal_pdf/ContractCityAttorneysIncomeTax.pdf.

[14] http://cjonline.com/news/2011-07-15/ag-defends-outside-counsel-decision.

As all of these examples illustrate, government entities around the country are historically and increasingly dependent on outside counsel to support a wide variety of public activities. Indeed, many localities are so dependent on these attorneys that the formal distinction between outside and in-house counsel ceases to make much sense. Is the City Attorney of Henderson, Texas, for example, any less the

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[15] http://www.walterhav.com/news/20100713102255775.pdf

[16] http://wislawjournal.com/2011/09/15/sheboygan-retains-council-for-mayor-complaints/

[17] http://www.cityofvernon.org/assets/docs/Vernon%20News_John%20Van%20de%20Kamp%20Retained_21611.pdf

City Attorney because he is retained by contract rather than as an employee? The IRS, for one, does not think so, as it has taken the position that city attorneys will generally be treated as municipal employees even when they are part-time contractors. See Devala A. Janardan, *Contract City Attorneys: The Employee vs. Independent Contractor Conundrum*, Int'l Municipal Lawyers Ass'n (March 2007) (discussing IRS efforts to classify Henderson City Attorney as employee) [18]

C. Exposing outside counsel to liability would drive up the costs of local government, limit the availability of high-quality legal services, and ultimately endanger individual rights.

Given how much local government entities depend on the services of outside counsel, exposing those lawyers to suit for their work on behalf of the government poses serious risks. Municipalities will either have to assume the cost of indemnifying their outside counsel—a practice some local laws prohibit—or they will have to force outside counsel to bear the burden and expense of § 1983 liability on their own. But even if outside counsel bear this liability and purchase insurance to cover it, much of the expense will likely be passed right back to struggling municipalities in the form of higher fees. Whether directly or indirectly, imposing liability for providing legal counsel to the government will increase the cost of legal counsel to the government. There is no "free lunch." *Richardson* v. *McKnight*, 521 U.S. 399, 419 n.3 (1997) (Scalia, J., dissenting). Raising the cost for local government, however, would be the best-case scenario, as even worse consequences may well result. Lawyers subjected to suit face not only the risk of money damages, but also the disruption, stress, and threat to professional reputation that accompany even the most baseless lawsuit. So the best and most expert lawyers may simply decide that representing the government is not worth the hassle. Unlike the prison industry, where the government is the only entity for which prison operators are able to work, the legal services industry is a competitive market in which the government must compete with private-sector clients. The best lawyers and law firms may sensibly choose to avoid work on behalf of the government rather than open themselves up to lawsuits where they would be the only ones in the room facing liability.

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[18] http://www.tml.org/legal_pdf/2007-IRScity-attorney.pdf.

Even more worrisome, if either cost or availability make it more difficult for local governments to retain legal counsel, they may choose to skimp on lawyers altogether. But everyone suffers when the government lacks good lawyers. Citizens and courts, as well as public officials, are all better off when government has high-quality counsel. Indeed, depriving school districts or police departments of ready access to informed legal advice would surely pose a far greater threat to civil rights than the extension of qualified immunity.

Worse still, depriving outside counsel of qualified immunity would limit the availability of legal advice and representation at the very times when they are needed most: when governments must make decisions on issues where the limits of their constitutional authority remain unclear. It is in those areas that qualified immunity protects the good-faith decisions of government officials; and yet, it is also where the threat of a § 1983 lawsuit is most likely to deter outside counsel from vigorously discharging his duties—and perhaps, from accepting the representation at all.

The record in this case amply illustrates the problem. During his investigation, Petitioner was repeatedly threatened with legal action by Respondent's counsel, who warned Petitioner that "you are the guy to get sued," and that Petitioner will have to "sweat it out as to whether or not [he had] individual liability." J.A. at 134; see also, *e.g.*, *id.* at 131 (threatening to "file claim for violation of [Respondent's] Fourth Amendment rights"); *id.* at 131-32 (warning Petitioner that "you are issuing an illegal order," but that "if you want to take the chance, go ahead"); *id.* at 134 (advising Petitioner that "if you want to issue illegal orders * * * you guys can suffer the consequences"); *id.* at 136 (warning petitioner that "if you guys want to order him * * * you will be named [in the lawsuit] and that is not an idle threat").

Absent the protection of qualified immunity, it is not difficult to imagine the chilling effect of such threats on outside counsel's willingness to act on the public's behalf. Without qualified immunity, outside counsel would be the only person involved for whom such threats have teeth. Private lawyers would be well advised to simply decline such sensitive representations. And yet, outside counsel are often the ones best situated to handle these matters responsibly. The rule adopted below would effectively deny to the public the benefits provided by outside counsel serving the public interest.

Finally, subjecting outside counsel to liability not faced by in-house counsel could have a potentially corrosive and destabilizing effect on local governments. As explained above, there is often little practical distinction between outside and in-house counsel. But depriving one of qualified immunity would dramatically alter their respective incentives, to the great detriment of the overall legal effort. A private lawyer stripped of qualified immunity will naturally proceed more cautiously than her public counterpart—and may even be unwilling to participate in making difficult legal judgments, lest she be singled out in a subsequent lawsuit as the weak link in the immunity chain.

This strong incentive to avoid risk defeats the primary advantage of employing specialized, experienced outside counsel to perform legally difficult tasks: the ability to rely on that counsel's experienced judgment in making complex, discretionary legal decisions. This is precisely the kind of "unwarranted timidity" in government action that qualified immunity exists to prevent. See *Richardson*, 521 U.S. at 408.

II. Whether They Serve In-House Or As Outside Counsel, Lawyers For The Government Perform An Essential Governmental Function That Merits Qualified Immunity.

The fact that local governments depend so much on outside counsel is not only of great practical significance, but it should also weigh heavily in the qualified immunity calculus. Although the Ninth Circuit relied on *Richardson* v. *McKnight*, 521 U.S. 399 (1997), to deny qualified immunity to outside counsel, that decision should not be read more broadly than it was written. In declining to extend qualified immunity to private prison guards, *Richardson* did not hold that all private contractors performing public functions lack qualified immunity. Rather, *Richardson* expressly reserved the possibility that certain public functions—those involving an "essential governmental activity"—deserve qualified immunity regardless of whether they are performed by private contractors or government employees. And, as we explain below, lawyers representing the government often perform essential government functions that require them to exercise judgment and discretion on behalf of the public interest. Such functions warrant qualified immunity.

A. Private parties performing essential governmental functions are entitled to qualified immunity.

In a host of decisions prior to *Richardson*, this Court "with fair consistency" applied a "'functional' approach to immunity questions." *Forrester* v. *White*, 484 U.S. 219, 224 (1988). Under that approach, the Court examined "the nature of the functions with which a particular official or class of officials has been lawfully entrusted," and it assessed whether certain immunities protected those functions. *Id.* In doing so, the Court "clearly indicate[d] that immunity analysis rests on functional categories, not on the status of the defendant" as a government employee or private contractor. *Briscoe* v. *LaHue*, 460 U.S. 325, 342 (1983).

Immunity flowed "not from rank or title or 'location within the Government,' * * * but from the nature of the responsibilities of the individual official." *Cleavinger* v. *Saxner*, 474 U.S. 193, 201 (1985) (quotation omitted). And many decisions reflected this

approach. *Ibid.*; *Forrester*, 484 U.S. at 224; *Briscoe*, 460 U.S. at 342; *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 268 (1993); *Burns* v. *Reed*, 500 U.S. 478, 489-490 (1991); *Malley* v. *Briggs*, 475 U.S. 335, 342-343 (1986); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 810-811 (1982); *Imbler* v. *Pachtman*, 424 U.S. 409, 420-429 (1976).

Richardson created a narrow exception to the "functional" analysis the Court had applied in those prior decisions, but did not wholly abandon it.[19] Although *Richardson* deprived private prison guards of qualified immunity by virtue of their status as private contractors, it took care to emphasize that certain "essential" government functions warrant immunity regardless of the status of the person performing them. As the Court explained, "we have answered the immunity question narrowly, in the context in which it arose." *Richardson*, 521 U.S. at 413. That context "is one in which a private firm" assumes an "administrative task (managing an institution)," and it "does not involve a private individual * * * serving as an adjunct to government in an *essential governmental activity*." *Ibid.* (emphasis added). The status-based distinction *Richardson* drew between public employees and private contractors thus depended on a function-based premise—namely, that the administrative function at issue was not "essential." In other words, there was "nothing special enough about the job" to immunize all who perform it. *Id.* at 412; see also *id.* at 402-404 (relying on *Wyatt* v. *Cole*, 504 U.S. 158, 159 (1992), which afforded no immunity to private individuals' use of replevin, garnishment, or attachment statutes).

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[19] Subsequent decisions have also continued to stress the functional approach. See, *e.g.*, *Van de Kamp* v. *Goldstein*, 555 U.S. 335, 342 (2009) ("To decide whether absolute immunity attaches to a particular kind of prosecutorial activity, one must take account of the 'functional' considerations discussed above.").

Whereas all government employees benefit from qualified immunity even when they serve nonessential functions, private citizens remain entitled to immunities when the government function they perform is essential. See *Imbler*, 424 U.S. at 423 (recognizing absolute immunity for grand jurors because of their "functional comparability" to judges); *Briscoe*, at 335 (recognizing absolute immunity for "all persons—governmental or otherwise"—who testify as witnesses); *Richardson*, 521 U.S. at 418 (Scalia, J. dissenting) ("I think it highly unlikely that we would deny prosecutorial immunity to those private attorneys increasingly employed by various jurisdictions in this country to conduct high-visibility criminal prosecutions."). *Richardson* did not change this longstanding and fundamental principle.

Hence, the first question to ask in determining the applicability of qualified immunity is whether the function performed under color of state law is an "essential governmental activity." *Richardson*, 521 U.S. at 413. Only when the function is *not* essential does it become necessary to consider whether private contractors who perform that function should be treated differently. And only when the function is *not* essential could it arguably make sense to require "conclusive evidence of a historical tradition of immunity for private parties carrying out these functions." *Id.* at 407. When a private individual performs a government function that *is* essential, however, the burden of proof need not be so high. It is enough in those cases to acknowledge that the function itself has traditionally warranted immunity, and to extend immunity to those who perform it.

B. Under this Court's precedents, an "essential government activity" is one in which the actor exercises significant discretion on behalf of the public good.

Although the Court in *Richardson* did not define what constitutes an "essential government activity," its qualified immunity jurisprudence suggests that a government actor performs such an activity when (1) he acts on behalf of the public good, and (2) exercises significant judgment and discretion in doing so.

As this Court has explained, qualified immunity is "based on two mutually dependent rationales." *Butz v. Economou*, 438 U.S. 478, 497 (1978). First is "the danger that the threat of such liability would deter [a person's] willingness to execute his office with the decisiveness and the judgment required by *the public good.*" *Butz*, 438 U.S. at 497 (emphasis added) (quoting *Scheuer*, 416 U.S. at 240). Second is "'the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to *exercise discretion.*'" *Ibid.* (emphasis added) (quoting *Scheuer*, 416 U.S. at 240); see also *Buckley*, 509 U.S. at 268 (explaining that qualified immunity exists "to protect officials who are required to exercise their discretion"). Both of these factors—a duty to serve the public good and a need to exercise discretion while doing so—characterize most of the activities that have been held to warrant qualified immunity.

With respect to prosecutors, for example, the Court has often stressed "[t]he public trust of the prosecutor's office," and observed that it "would suffer were the prosecutor to have in mind his own potential damages liability when making prosecutorial decisions." *Van de Kamp v. Goldstein*, 555 U.S. 335, 342 (2009) (quotation omitted); see also, *e.g.*, *Imbler*, 424 U.S. at 423 (worrying about "deflection of the prosecutor's energies from his public duties"). The Court has similarly stressed the need for immunity to protect discretionary decision-making, as a prosecutor "inevitably makes many decisions that could engender colorable claims of constitutional deprivation." *Imbler*, 424 U.S. at 425. Immunity prevents "the possibility that [a prosecutor] would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.* at 423.

Furthermore, when this Court has declined to apply qualified immunity, it has typically done so because the activities at issue lacked one or both of "public interest" and "exercising discretion" features that justify the extension of qualified immunity. For example, private parties invoking replevin, garnishment, or attachment statutes do not merit qualified immunity because there is nothing "requiring them to exercise discretion; nor are they principally concerned with enhancing the public good." *Wyatt*, 504 U.S. at 168. Similarly, when the Court declined to apply qualified immunity to government-appointed defense attorneys, it stressed the "marked difference" between appointed defense attorneys representing individual defendants and prosecutors who "represent the interest of society as a whole." *Ferri* v. *Ackerman*, 444 U.S. 193, 202-203 (1979). And in *Richardson* itself, the majority suggested that the private-prison firm in that case lacked both features, noting that the firm was "systematically organized to perform a major administrative task for profit," while the "important discretionary tasks were reserved for state officials." *Richardson*, 521 U.S. at 411.

Where the twin features of acting in the public interest and exercising discretion are present, however, those features suggest an essential government function to which qualified immunity applies.

C. Private lawyers who act on behalf of public institutions, and who exercise discretion in serving the public good, are performing "essential government activities" that warrant qualified immunity.

There can be little doubt that lawyers representing the government, whatever their employment status, often perform essential governmental functions that distinguish them from both other government employees and fellow lawyers. As agents of the government, they must serve the public interest; as lawyers, they must exercise judgment and discretion in doing so. These two critical functions warrant qualified immunity, regardless of the lawyers' formal employment status.

1. When private lawyers work for public institutions, they have a fiduciary duty to act in the best interest of their client—a duty that, given the public nature of the client, is synonymous with the public interest.

This Court famously observed long ago that a lawyer for the government "is the representative not of an ordinary party to a controversy, but of *a sovereignty* whose obligation to govern impartially is as compelling as its obligation to govern at all." *Berger* v. *United States*, 295 U.S. 78, 88 (1935) (emphasis added). Those words are chiseled on the walls of the Department of Justice. See also Robert H. Jackson, *The Federal Prosecutor* (April 1, 1940) ("Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just."). And although the Court "was speaking of government prosecutors * * * no one, to our knowledge, has suggested that the principle does not apply with equal force to the government's civil lawyers." *Freeport-McMoran Oil & Gas Co* v *Fed Energy Reg Comm'n*, 962 F2d 45, 47 (D.C. Cir. 1992). It applies with equal force, too, to lawyers for local governments. Jack B. Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 ME. L. REV. 157, 169 (1966). (explaining complex public interest implications of city attorney's proposed settlement in a condemnation case).

The notion that government lawyers owe a duty to the public interest differs sharply from the ordinary obligation lawyers have to their private clients. Lawyers representing the government often have special authority—for example, to decide upon settlement—that they would not have if representing a private client. Restatement (Third) of Law Governing Lawyers (2000) § 97, comm. g. Lawyers representing the government also often labor under special ethical obligations. See, *e.g.*, *Brady* v. *Maryland*, 373 U.S. 83 (1963). And given that all government lawyers acting under color of state law are subject to constitutional restraints on government action, they remain uniquely vulnerable to suit.

Moreover, the duty of a government lawyer to serve the public interest arises from the special nature of his government client—not from the peculiarities of his employment contract. It applies equally to "a lawyer employed full time by a governmental client as well as a lawyer in private practice who provides legal services to a governmental client." Restatement (Third) of Law Governing Lawyers § 97, comm. a. Thus, for example, "a lawyer in private practice retained to function part-time as a public prosecutor operates in that regard subject to restrictions on prosecutors with respect to their advocacy, disclosure obligations, and similar matters * * * notwithstanding that the lawyer would not be so constrained in representing nongovernmental clients." *Id.* at comm. i. A lawyer, in other words, "cannot escape the heightened ethical requirements of one who performs governmental functions merely by declaring he is not a public official." *People ex rel. Clancy* v. *Superior Court*, 705 P.2d 347, 351 (Cal. 1985) (holding that lawyer hired by city for public nuisance abatement could not receive contingency fee). Rather, "the responsibility follows the job." *Ibid.*

Lawyers representing the government thus differ from other lawyers insofar as they represent a unique client—the public interest—that imposes unique responsibilities.

2. The second feature distinguishing government lawyers is the inherently discretionary nature of their work on behalf of the government. In contrast to the prison-guard function that the Court in *Richardson* characterized as merely an "administrative task," the functions of providing legal advice, conducting inter-

nal investigations, and representing the government in litigation are far from merely administrative.

Government prosecutors, for example, are "duty bound to exercise [their] best judgment both in deciding which suits to bring and in conducting them in court." *Imbler*, 424 U.S. at 424. Indeed, the need to protect this "independence of judgment" entitles prosecutors to absolute immunity for their prosecutorial functions (and qualified immunity for others). *Id.* at 423.; see also *Antoine* v. *Byers & Anderson, Inc.*, 508 U.S. 429, 436 (1993) (explaining that judicial and quasi-judicial immunities protect people who "exercise a discretionary judgment as part of their function," and thus do not protect court reporters). Similar principles apply to government attorneys in civil proceedings. *Butz,* 438 U.S. at 513-17.

Even outside of litigation, however, government lawyers must frequently make sensitive discretionary judgments. For example, government lawyers at all levels routinely advise agencies about the scope of their authority or the legal consequences of their actions. See generally Thomas O. McGarity, *The Role of Government Attorneys in Regulatory Agency Rulemaking,* 61 LAW & CONTEMP. PROBS. 19 (Winter 1998). Like all lawyers giving legal advice, this entails the difficult task of interpreting vague or conflicting legal obligations and making judgments based on uncertain facts. It is more than a mechanical—or "administrative"—application of law to fact.

Moreover, unlike lawyers for private clients, lawyers giving legal advice to the government have an even more sensitive task. An agency's interpretation of an ambiguous legislative mandate often necessarily involves disputed policy judgments. See *Chevron,* *U.S.A.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). And this is no less true for local government lawyers as for lawyers to federal agencies. As Judge Weinstein has explained, reflecting on his time as County Attorney of Nassau County, there are many "special problems of judgment presented by a local government practice." Weinstein, *Some Ethical and Political Problems of a Government Attorney*, at 158. Most of them "are not so much the legal-technical ones of what can be done, or how to do it, but what should be done." *Ibid.*

Government lawyers at all levels and of all kinds are therefore routinely called upon to exercise judgment and discretion. This sets their activities apart from the merely "administrative" functions performed by (for example) the prison in *Richardson*.

CONCLUSION

In sum, both in-house and outside counsel to the government perform essential activities that make them distinct among government employees, as well as among their fellow lawyers. Not only must they represent the public interest—they must do so while exercising discretion and judgment. These functions warrant qualified immunity regardless of the lawyers' formal employment status. A contrary outcome in this case would seriously undermine the ability of *amici* and other public institutions to retain high-quality, cost-effective counsel to meet the pressing needs of their constituents. We respectfully ask the Court not to countenance that result.

The decision below should be reversed.

Respectfully submitted.

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APPENDIX

The National School Boards Association (NSBA) is a not-for-profit federation of state associations of school boards across the United States. Through its state associations, NSBA represents the nation's 95,000 school board members, who, in turn, govern approximately 14,000 local school districts serving more than 46.5 million public school students. One of NSBA's constituent groups, the Council of School Attorneys, is the professional organization for approximately 3,000 public and private attorneys who provide legal services to public school districts.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. NACo provides essential services to the nation's 3,068 counties through advocacy, education, and research.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The National League of Cities (NLC), founded in 1924, is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with 49 state municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with populations of more than 30,000. There are over 1,200 such cities in the country today. Each of these cities is represented in the Conference by its chief elected official, the mayor.

The International City/County Management Association (ICMA), founded in 1914 as the City Managers' Association, is a not-for-profit professional and educational organization for chief-appointed managers, administrators, and assistants in cities, towns, counties, and regional entities. Its mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the Nation's 50 states, its commonwealths and territories. NCSL provides research, technical assistance and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and it regularly submits briefs amicus curiae to this Court, in cases that, like this one, raise issues of vital state concern.